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Supreme Court of the United States

October Term, 1995

JOHN T. HENNESSY; MICHAEL B. HIGH; WILLIAM A. BRACKEN; LARRY GIBSON; MARTHA C. HITCHCOCK; LAURENCE A. LISS; KEN MANCINI; GEORGE S. RAPP; ROBERTA GRIFFIN TORIAN; FRANK J. SORIERO,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK,

Respondent,

THOMAS CALLAHAN,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MERITOR SAVINGS BANK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ALICE W. BALLARD, Esquire
Counsel of Record
LYNN MALMGREN, Esquire
SAMUEL & BALLARD, P.C.
225 S. 15th Street, Suite 1700
Philadelphia, PA 19102
Tel: (215) 893-9990
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

This case presents questions with respect to the powers and duties of the Federal Deposit Insurance Corporation (FDIC) as receiver for failed depository institutions under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The section involved is codified at 12 USC Section 1821, and references herein to "Subsections" relate to subsections of Section 1821. The Subsections primarily implicated are Subsection (d) governing the administration of claims against the failed institution's estate, and Subsection (e) governing the repudiation of contracts entered into by the failed institution.

The questions presented by the case concern the receiver's treatment of claims for severance pay filed by former employees of failed institutions:

1. May the receiver, pursuant to a long-standing, unpublished policy (the "No Severance Policy"), categorically disallow or repudiate all claims for severance pay?

2. After the receiver disallows a claim, if the claimant files suit under Subsection (d)(6) and the receiver asserts the defense of repudiation, should not the receiver be required to show that the obligation in question was repudiated in conformity with Subsection (e)(1)?

3. If the receiver repudiates a severance pay obligation, does the face amount of the obligation constitute "actual direct compensatory damages" under Subsection (e)(3)?

QUESTIONS PRESENTED FOR REVIEW

4. When the receiver or the District Court is called upon to construe an agreement entered into by the failed institution before receivership, does the receiver or Court stand in the institution's shoes?

LIST OF PARTIES

PETITIONERS

JOHN T. HENNESSY
MICHAEL B. HIGH
WILLIAM A. BRACKEN
LARRY GIBSON
MARTHA C. HITCHCOCK
LAURENCE A. LISS
KEN MANCINI
GEORGE S. RAPP
ROBERTA GRIFFIN TORIAN
FRANK J. SORIERO
THOMAS CALLAHAN

RESPONDENT

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR MERITOR SAVINGS BANK

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PETITION FOR WRIT OF CERTIORARI

The Petitioners by their undersigned counsel respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the proceeding on June 29, 1995, *affirming* the District Court's order denying Petitioners' Motion for Summary Judgment, and granting Respondent's Motion for Summary Judgment, on Petitioners' claims for severance and related payments.

OPINIONS BELOW

On July 29, 1994, the United States District Court for the Eastern District of Pennsylvania, by the Honorable Marvin Katz, entered an Order denying Petitioners' Motion for Summary Judgment, granting Respondent Federal Deposit Insurance Corporation's ("FDIC") Motion for Summary Judgment, and entering judgment in favor of the Respondent and against the Petitioners. Copies of the Judgment, Order and Memorandum are appended to this Petition.

On June 29, 1995, a panel of the United States Court of Appeals for the Third Circuit affirmed the District Court's Order granting summary judgment to the FDIC on Petitioners' claims. That decision is reported at 58 F.3d 908 (3d Cir. 1995). A copy of the opinion is appended to this Petition.

The Order denying the Petition for Rehearing is reported at 66 F.3d 659. A copy of the Order is appended to this Petition.

JURISDICTION

Petitioners' timely Petition for Rehearing was denied on September 26, 1995. This Petition is filed pursuant to Rule 20, Rules of the Supreme Court, *as amended*. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, § 1254(1).

STATUTE INVOLVED

The statute involved is the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA), Title 12, Section 1821, of the United States Code. A copy of the pertinent sections of the statute is appended to this Petition.

STATEMENT OF THE CASE

This case arises out of the failure of Meritor Savings Bank, formerly Philadelphia Savings Fund Society (long known as "PSFS"), the oldest and at one time the largest banking institution in Philadelphia. The Petitioners were key executives of Meritor at the time of failure. The Petitioners brought their claim against the Federal Deposit Insurance Corporation ("FDIC") in its capacity as receiver of Meritor's estate. The cause of action is the rejection by the receiver of Petitioners' claims for severance payments under Meritor's Separation Pay Program (the "SPP").

The history of the case is as follows:

1. On Friday, December 11, 1992, the Pennsylvania Secretary of Banking, having determined that Meritor was unsafe and unsound, seized the bank and closed it. This terminated the employment of Meritor employees and triggered their rights to severance pay under the SPP, provided that their loss of employment could be attributed to one of four corporate events specified in the SPP, namely: "lack of work, job elimination, reorganization or reduction-in-force".

2. After seizing and closing Meritor, the Secretary of Banking appointed the FDIC as receiver. The receiver thereupon transferred the bulk of Meritor's business as a going concern to Mellon Bank in consideration of Mellon's assuming Meritor's deposit account liabilities (and certain other liabilities) and paying a premium of $181,300,000. Meritor's 27 offices reopened for business as usual on Saturday, December 12, or Monday December 14, as branches of Mellon, which operated thereafter in the Philadelphia area as "Mellon PSFS". The Purchase and Assumption Agreement between the receiver and Mellon provided that the receivership estate would bear 80% of net losses and receive 80% of net recoveries on Meritor loans taken over by Mellon.

3. The events of December 11-14 completed Mellon's acquisition of Meritor's business, an acquisition that had begun in 1990, when Meritor sold its suburban branches to Mellon. Petitioners contend that the cumulative results of the 1990 sale and the transactions called for by the Purchase and Assumption Agreement (including

the continuation of the Meritor business as a going concern and the loss/gain sharing provisions) amounted to a reorganization for purposes of the SPP, perfecting the employees' rights to severance pay.

4. At a meeting shortly after the appointment of the receiver, the terminated employees asked Mr. Goodner, the FDIC closing manager, whether their severance rights would be honored. Without pausing to read the SPP, Goodner answered in the negative.

5. In rejecting all claims for severance pay out of hand, Goodner was following the FDIC's No Severance Policy. The No Severance Policy has not been made public. It is described in FDIC's Responses to Petitioners' Second Set of Interrogatories and Request for Production of Documents as follows:

> . . . it is the long-standing policy of the FDIC, as receiver for failed depository institutions, not to pay severance benefits and not to allow severance pay claims of the former employees of such institutions . . . . This policy was fully applicable to the claims of former Meritor employees for severance benefits under Meritor's SPP.
>
> . . . the FDIC's long-standing policy is communicated to FDIC employees who have responsibility for severance pay issues in training sessions and otherwise. In addition, this long-standing policy remains in effect.
>
> FDIC personnel responsible for allowing or disallowing claims in the Meritor receivership were instructed in accordance with the policy described [above].

The No Severance Policy has been in effect since at least 1967. The instant case is the first in which it has been disclosed.

5. In due course, the Petitioners filed proofs of claim, and the receiver issued notices of disallowance. Again, the receiver was following FDIC policy, which is that: "The FDIC considers severance payments to employees who are working at the time of bank failure to be a nonprovable claim". This policy is inconsistent with the testimony of the FDIC Chairman before a Congressional committee to the effect that the employees of a failed bank had the right to file proofs of claim for severance pay.

6. On March 25, 1994, the Petitioners filed a second amended complaint. On April 18, the receiver filed an answer denying any obligation to pay benefits called for by the SPP. The answer asserted as an affirmative defense: "Plaintiffs' claims are barred because the FDIC properly exercised its power to repudiate contracts pursuant to 12 U.S.C. Section 1821(e)(1), and Plaintiffs are not entitled to any damages for repudiation under 12 U.S.C. Section 1821(e)(3)".

7. The administrative record contains no reference to repudiation. None of the claim disallowance notices specifies repudiation as a reason for disallowance, nor does any other communication from the receiver mention repudiation. This is in contrast to the administrative record in *Monrad and Crone v. FDIC*, 62 F.3d 1169, 1172 (9th Cir. 1995), where the Ninth Circuit noted that "[e]ach plaintiff received a February 4, 1992 termination letter

advising that the [receiver] was repudiating and disaffirming any contract to which the bank was a party".

8. On July 29, 1994, the District Court granted the receiver's motion for summary judgment. Its opinion dealt with the issues presented by the complaint as follows:

> (a) The District Court held that because the FDIC was involved with the termination of Meritor rather than the continuation of its business, there was no reorganization under the dictionary definition of the word. Consequently, Petitioners' rights were never activated.
>
> (b) The District Court held that the Petitioners failed to show that they were terminated before the appointment of the receiver. Consequently their rights were contingent and their claims were not provable.
>
> (c) The District Court held that Goodner effectively repudiated the SPP when he informed Meritor employees that they would not receive severance pay.
>
> (d) The District Court held that severance payments are not "actual direct compensatory damages" compensable under the statutory provisions governing repudiation (Subsection (e)(3)).

The District Court's opinion took cognizance of the No Severance Policy, but said no more about it.

9. In discussing reorganization, the District Court confined its attention to the actions of the receiver and

based its conclusion on the fact that the receiver itself did not continue the Meritor business. The court did not consider the significance of the fact that the purchaser did carry forward the Meritor business under the Meritor trade name, with the same customers and at the same locations. The court did not address the question whether the continuation of the business by the purchaser constituted a "reorganization" for purposes of the SPP. It made no effort to construe the SPP and accordingly did not say whether the receiver stood in Meritor's shoes.

10. The Petitioners appealed to the Court of Appeals for the Third Circuit, and on June 29, 1995, the Court of Appeals affirmed. The Court's opinion expressed approval of the No Severance Policy as being "a conscious decision to promote uniform treatment of similar claims". With respect to the issues discussed by the District Court, the Court of Appeals came to the following conclusions:

> (a) With respect to reorganization, the Court of Appeals noted that a receiver, unlike a conservator, does not have as its purpose the preservation of an institution as a going concern. It held that the takeover and sale of the bank's assets by the receiver in the instant case constituted a termination of the bank's business, not a continuation of the business; and that, consequently, there was no reorganization. Later, the Court expressed reservations about this holding and added a second holding to the effect that the receiver had repudiated the SPP. Opinion, pp. 18-19, App. at 22-23.

(b) In its discussion of the reorganization issue, the Court of Appeals brushed aside Petitioners' contention that the continuation of Meritor's business in the hands of the purchaser constituted a reorganization for purposes of the SPP. Accordingly, like the District Court, the Court of Appeals made no effort to construe the SPP and did not consider whether the receiver or the District Court stood in Meritor's shoes.

(c) With respect to the contingency issue, the Court of Appeals held that Petitioners had made no showing that insolvency triggered their rights under the SPP. Accordingly, the Court agreed with the District Court that Petitioners' rights were contingent and their claims were not provable. Opinion, p. 18, App. at 22.

(d) With respect to repudiation, the Court of Appeals simply stated that the receiver repudiated the SPP pursuant to the statutory provisions governing repudiation. It did not say who made the decision to repudiate, or when the decision was made. Opinion, pp. 19-20, App. at 23-25.

(e) With respect to damages, the Court of Appeals held that severance payments are analogous to liquidated damages and accordingly are not compensable as "direct compensatory damages" under Subsection (e)(3). In reaching this conclusion, the Court followed the opinion of the Court of Appeals for the First Circuit in *Howell v. FDIC*, 986 F.2d 569, 573 (1st Cir. 1993),

and explicitly rejected the conflicting opinion of the Court of Appeals for the District of Columbia in *Office and Professional Employees Int'l Union v. FDIC*, 27 F. 3d 598 (D.C. Cir. 1994).

11. On August 10, 1995, the Petitioners filed a petition for rehearing. After requesting and receiving a brief from the FDIC, the Court of Appeals denied the petition on September 26.

REASONS FOR ALLOWING THE WRIT

The Petitioners submit that the writ should be allowed for two of the reasons listed in Rule 10, to wit, in Part I the presence of an important question of federal law that should be settled by this Court, and in Part II the presence of a conflict of decisions by different Courts of Appeals. Part III deals with a secondary question, important to the administration of the statute.

I

The Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

There is need for this Court to pass upon the FDIC's No Severance Policy. The policy has been in effect since at least 1967 and has wide application. The FDIC has cited over fifteen cases (many unreported) in which the FDIC, as receiver, denied severance pay, presumably on the basis of the policy, and the district court upheld the denial. However, the instant case is the first in which the

policy was disclosed to the district court and *a fortiori* the first in which the policy itself has been approved by a court of appeals.

Is the No Severance Policy valid? The Court of Appeals answered that question briefly and in the affirmative. Its entire discussion reads as follows:

> We fail to comprehend how a consistent denial of the same type of claim constitutes an abuse of the FDIC's discretion. If anything, such a longstanding policy demonstrates a conscious decision to promote uniform treatment of similar claims.

The No Severance Policy applies to all depository institutions for which the FDIC would be receiver in the event of insolvency. Under the Court of Appeals' decision, the managements of those institutions lose the ability to offer severance pay as a reward to employees who do not desert the institution in time of trouble. By the same token, loyal employees who stay on the job lose their severance benefits.

Our position is that the No Severance Policy is in conflict with the statutory duties of the FDIC as receiver in that the policy short circuits both the provisions governing the administration of claims and the provisions governing repudiation of contracts.

1. The No Severance Policy short circuits the statutory provisions governing the administration of claims.

The fundamental error in the Court of Appeals analysis of the No Severance Policy is the Court's assumption

that, even though a claim is founded on a valid, unconditional legal right, the receiver has discretion to disallow it for reasons of policy. The receiver has no such discretion. He cannot pick and choose which claims, or which kinds of claim, he will allow. The FDIC cannot adopt a rule of automatic discrimination against bank employees.

Like any other receiver, the FDIC is required to take over the assets, collect moneys due the institution and pay priority obligations, thus establishing the amount available for general creditors. (Subsection (d)) The receiver then reviews general creditors' claims, allows those that are proved to the receiver's satisfaction, and distributes the available assets to the general creditors, pro rata. Any remaining balance goes to the institution's shareholders.

According to the FDIC Chairman, a former bank employee should be able to submit a claim for severance pay to a receiver who, in the Chairman's words, will act as a "fiduciary similar to a trustee in bankruptcy"; - a fiduciary who, again according to the Chairman, will be "sensitive to the concerns of everyone who is affected by a bank failure - including former employees"; - a fiduciary who advises former employees that they have "the right to complete and return proof of claim forms to the FDIC in connection with any matter for which they believed they had sustained a loss, including severance pay, vacation pay, or sick leave".

If the Meritor receivership had corresponded to the Chairman's description, the employees' claims would have been weighed by a receiver who was duty bound to be fair to all creditors, including the employees. And the

employees could also have expected the receiver to be knowledgeable as to the events leading up to Meritor's failure. During the four troubled years preceding the receivership, the FDIC in its corporate capacity had been so involved with Meritor's affairs that bank management almost felt it was working for the FDIC. As the executive vice president of Meritor put it, ". . . . we had cooperated with the FDIC and I effectively considered ourselves to be FDIC management . . . . "

What the employees experienced was quite different. For them there was, effectively, no receiver at all. Mr. Goodner rejected the employees' claims before they were filed, without reading the corporate plan under which the claims were made. He was not a member of the claims office, and no one from that office talked to him about the claims.

Having been thus summarily turned down, the Petitioners went through the formalities of submitting proofs of claim (all disallowed), after which they proceeded to litigation under Subsection (d)(6), which calls for a suit *de novo*, not a review of the administrative process. With the filing of suit, all possibility of a benevolent fiduciary such as described by Chairman Seidman ended, and the receiver became a vigorous adversary. Because the action was a suit *de novo*, the receiver's defense was not limited to the reasons specified in the notices of disallowance; the receiver was free to throw up any defense that counsel might devise, even though the receiver had not relied on, or even mentioned, that defense in his dealings with the Petitioners.

2. The No Severance Policy short circuits the statutory provisions governing repudiation of contracts.

One of the receiver's affirmative defenses (not mentioned during the administrative stage) was the assertion that the receiver had properly exercised its power to repudiate contracts. The exercise of that power is governed by Subsection (e), which relates generally to contracts entered into before appointment of the receiver. Subsection (e)(1) says that the receiver may repudiate any contract or lease to which the failed institution is a party (Clause (A)), provided that the receiver makes two determinations: first, that the performance of the contract is burdensome (Clause (B)); and second, that repudiation will promote the orderly administration of the institution's affairs (Clause (C)).

In the instant case there is no trace of the determinations called for by Clauses (B) and (C). The receiver takes the position that repudiation was effected when Goodner told the employees that severance would not be paid, but Goodner's description of his actions says nothing about repudiation, let alone Clauses (B) and (C).

Of course, when Goodner refused to pay, he repudiated the obligation in the dictionary sense of the word, but was his refusal an effective repudiation under the statute? The receiver says (correctly) that the statute does not require the receiver to make formal findings of his determinations under Clauses (B) and (C), but that is not to say that the statute requires no determinations at all.

When the issue was raised in the District Court, the receiver's brief pointed to the No Severance Policy and

said that: "The FDIC determined, pursuant to its long-standing policy, that payment of severance benefits to former Meritor employees would be inherently burdensome and detrimental to the Receiver". (Memorandum in Support of Defendant's Motion for Summary Judgment.) To support this statement, the brief cited the deposition of Wayne J. Ness, a member of the FDIC staff, who had nothing to do with the Meritor receivership. Upon being asked whether he knew of any specific actions taken by the receiver to repudiate the SPP, Ness said: "Insofar as general receiverships are concerned, the mere fact that we don't pay them, the conduct of the receiver is a form of repudiation."

The District Court adopted the receiver's view, characterizing Goodner's refusal to pay as an "informal repudiation" of the SPP. Opinion, p. 10, App. at 55.

On appeal, the Court of Appeals did not focus on the absence of evidence that anyone had ever made the determinations called for by Clauses (B) and (C). It simply recited, as a fact, that the receiver had repudiated the SPP. It treated the Petitioners' arguments as if they were addressed to the formalities of repudiation rather than the question whether there was, in fact, a repudiation in any form.

The decisions relied on by the Court of Appeals are not on point. They do not address the question put at issue by the receiver's answer in the instant case, which is simply: if the receiver avers as an affirmative defense that it properly exercised its power, do not the ordinary rules of litigation require the receiver to prove its averment by a preponderance of the evidence? In all the cited

decisions there was either no doubt or no argument that the receiver had exercised its power; the plaintiff averred as much by attacking the repudiation in the complaint. In the instant case the complaint is silent as to repudiation; it was the receiver who raised the issue and who therefore has the burden of proof.

The Court of Appeals' decision in the instant case writes Clauses (B) and (C) out of Subsection (e)(1). If it is allowed to stand, the receiver will not have to concern himself with the statutory justification for repudiation. He can simply do as he did here - apply the No Severance Policy, refuse to pay the obligation and omit any reference to repudiation in the notice of disallowance. If the claimant files suit, the receiver can assert repudiation as a defense, and prevail on the grounds that mere refusal to pay fulfills all the statutory requirements.

II.

The Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter.

1. **There is conflict among circuits as to whether, if a receiver repudiates a severance pay obligation, the face amount of the obligation constitutes "actual direct compensatory damages" under Subsection (e)(3).**

By the time the receiver was appointed in the instant case, the Petitioners had already rendered the consideration called for by the SPP. No action remained to be taken by them. Their rights were unconditional.

The receiver's position in that case was that, even if the Petitioners had fully performed before the receivership, Meritor's obligations to the Petitioners were nevertheless subject to repudiation under Clause (1) of Subsection (e) without payment of damages under Clause (3). The Petitioners countered with two reciprocal contentions. The first contention was that it does not make sense for the receiver to repudiate an unconditional obligation to pay a fixed sum; "[the FDIC] cannot repudiate contracts under which the non-bankrupt party has performed", *LaMagna v. FDIC*, 828 F. Supp. 1, 2 (D. D.C. 1993). The second contention was that, if repudiation is permitted, the face amount of the obligation constitutes "actual direct compensatory damages" for which the receiver is liable. This reciprocal reading of Clauses (1) and (3) was adopted by the District Court for the Northern District of Illinois in *Morton v. Arlington Heights Federal Savings and Loan, et al*, 836 F. Supp. 477, 481 (N.D. Ill. 1993), where the court said: "While it would clearly be unjust (and perhaps unconstitutional) to permit an institution in receivership to walk away from a contract that had been fully performed on the other side, the provision for a damage remedy largely eliminates the concern".

The unjust, and perhaps unconstitutional, result that the District Court avoided in *Morton* was accepted as inevitable by the First Circuit in *Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993). In *Howell* the receiver repudiated severance obligations owing to officers of the failed bank, and the officers sued for damages. The Court of Appeals noted that "[a] stranger to [Subsection (e)] might think it apparent that breach of a contract to make severance payments inflicts damages on a discharged employee in

the amount of the promised payments". 986 F.2d at 572. However, the Court concluded, "not without misgivings, that the amounts stipulated in the contracts were analogous to liquidated damages for injuries that might, or might not, flow from the termination of employment." Consequently, the Court reasoned, they were not actual direct compensatory damages for purposes of Subsection (e)(3).

The *Howell* court recognized that the result of its decision was "a severe one" (986 F.2d at 570) and offered a "guess" that Congress was so determined to pare back damage claims founded on repudiated contracts that it "might wish to disallow certain damage claims deemed less worthy than other claims". 986 F.2d at 572. The Court made no suggestion as to why Congress might consider employees' severance claims less worthy, but there are references in its opinion to "golden parachutes", which may explain its position. There are no references to golden parachutes in the instant case.

Five months after the *Howell* decision, virtually the same question was presented to the Court of Appeals for the District of Columbia in *Office and Professional Employees International Union v. FDIC*, 27 F.3d 598 (D.C.Cir. 1994) (referred to in the instant litigation as *"NBW"* because it involved the National Bank of Washington). In *NBW* the severance arrangements were embodied in a collective bargaining agreement that was formally repudiated by the receiver. The District Court, following the reasoning of *Howell*, held that the receiver was not liable for damages. The Court of Appeals, rejecting *Howell's* reasoning, reversed. Its rationale was that, in an at will relationship, "severance payments are properly

characterized as consideration for entering into (or continuing under) the employment contract and therefore are compensable as actual damages under FIRREA when the contract is repudiated". 27 F.3d at 604.

The D.C. Circuit concluded that the First Circuit had miscategorized the nature of severance provisions in employment contracts. It also rejected the FDIC's argument (based on the First Circuit's guess in the *Howell* opinion) that Congress, faced with mountainous bank failures, determined to pare back damage claims founded on repudiated contracts. The D.C. Circuit said: "The necessary corollary to the limitation that damage claims are to be determined as of the date of insolvency is that *all* claims existing on that date are preserved". *Id.* (emphasis added).

Two Courts of Appeals have confronted the split of opinion between *Howell* and *NBW*. They, too, are split: The Third Circuit in the instant case, after reviewing *Howell* and *NBW*, adopted the *Howell* interpretation. The Court of Appeals for the Ninth Circuit, in *Monrad and Crone v. FDIC*, 62 F.3d 1169, filed on August 7, 1995, rejected *Howell* and followed *NBW*.

In *Monrad* the receiver repudiated severance pay obligations arising out of the failed bank's personnel policy. The District Court awarded damages equal to the repudiated obligations. The Ninth Circuit affirmed, saying that, as between *Howell* and *NBW*, *NBW* (referred to by the Ninth Circuit as OPEIU) "offers the better reasoned approach". 62 F.3d at 1174.

2. Whether damages from repudiation of severance obligations are recoverable is an important question.

FIRREA covers more than twelve thousand FDIC insured commercial banks and savings institutions, with a combined total of more than 1,732,395 employees. (FDIC Quarterly Banking Profile, Second Quarter 1995.) If the opinions in *Howell* and the instant case are to be believed, Congress intended to make the severance pay rights of all these employees subject to repudiation without redress. If *NBW* and *Monrad* are correct, Congress had no such intent, and severance pay rights existing as of the date of insolvency are to be honored. The resolution of this conflict is important to the employees of all depository institutions subject to FIRREA.

Resolution of the conflict is also important to management and shareholders. As exemplified in the instant case, when an institution becomes known as "a troubled bank", its employees and officers, especially key executives, become fair game for recruiters. At the same time, management of the troubled institution is vitally concerned with maintaining the integrity of its staff and the value of its business. The obvious way to accomplish this is to assure the staff that they will be compensated - by severance pay - for staying on the job until the situation is resolved. In the words of the Court of Appeals in the instant case, "disallowance of promised severance pay may chill a troubled bank's ability to effectively retain able employees". Opinion, p. 23, App. at 30.

Howell and the instant case explicitly accept that result and attribute it to the will of Congress. *NBW* and

Monrad read the statute the opposite way. Depository institutions are entitled to know whether promises of severance pay are enforceable like other promises, or whether they can be nullified just when the promised reward has been fully earned.

III

The Court of Appeals' opinion raises a secondary question important to the administration of the statute.

1. **When the receiver, acting under Subsection (d)(5)(B), or a District Court in a suit under (d)(6), construes an agreement entered into by a failed institution, does it stand in the institution's shoes?**

This petition rests on the premise that the Petitioners had provable claims as of the date of receivership and that the action of the receiver in rejecting these claims was improper. The receiver will doubtless argue that the petition is moot because the Court of Appeals held the Petitioners' claims to be contingent and consequently not provable.

The touchstone for deciding whether the claims were provable is the provision in the SPP that:

> Benefits become payable to you upon your unemployment on an involuntary basis from Meritor Financial Group if that separation is attributable to lack of work, job elimination, reorganization or reduction-in-force.

There is no doubt that the first qualification (involuntary unemployment) was met. Petitioners became unemployed, involuntarily, when the bank was closed. Whether the Petitioners met the second qualification

(reorganization) requires more analysis. The question is, did the transactions accompanying their unemployment constitute a reorganization for purposes of the SPP?

The Court of Appeals' answer to that question is equivocal. Early in its opinion it held: "Meritor did not undergo a reorganization that would trigger plaintiffs' rights to severance pay". But later it cast doubt on its own holding:

> Having determined that there was no event that triggered the payment of severance benefits, it would ordinarily be unnecessary to dispose of the other issues raised by the parties regarding their entitlement to severance pay, i.e., repudiation and whether the failure to pay severance benefits constituted actual direct compensatory damages under FIRREA. However, the parties have forcefully argued their positions regarding the various "triggering" provisions, and have at least implied that they are susceptible to more than one reasonable interpretation. We would normally commit the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced. We do not do so here because even if we were to assume a triggering event had occurred, we would nonetheless affirm the district court's grant of summary judgment in favor of the FDIC because the FDIC repudiated the SPP pursuant to its statutory authority under 12 USC Section 1821. Opinion, pp. 18-19, App. at 22-23.

Whatever else this curious passage may mean, it clearly means that the Court of Appeals was not sure that the repudiation issue was moot.

Our position is that this Court should respect the Court of Appeals' doubts and consider this petition on the premise that the Court of Appeals did not unequivocally decide the reorganization issue. But even if this Court were to take the opposite position, Petitioners contend that this petition would not be moot because, in considering the issue, the Court of Appeals did not properly interpret the statute, nor did it attempt to construe the meaning of the word "reorganization" as used in the SPP.

First, the interpretation of the statute. The statutory provision involved here is Subsection (d)(2)(A)(i), which says that the receiver shall "by operation of law, succeed to all rights, titles, powers and privileges of the insured depository institution. . . . ". The preceding section (Subsection (c)(3)(B)) says that the receiver shall also have the powers and duties imposed by State law on a receiver appointed by the State banking authority.

In *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 129 L. Ed. 67, 62 USLW 4487, 4489 (1994), this Court said: "It is hard to avoid the conclusion that Section 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law. . . . " The reference to state law leads to the Pennsylvania Banking Code (71 P.S. Section 733-701), which says that a receiver appointed by the Pennsylvania Secretary of Banking shall have the rights, powers and duties of a general receiver appointed by any court of equity and shall be vested with all the rights, powers and duties of the institution for which he is a receiver.

The Court of Appeals in the instant case chose not to follow *O'Melveny*. Its opinion does not recognize the obligation of the receiver to construe the SPP from Meritor's viewpoint. It did not place the receiver (or the District Court in this litigation) in the shoes of Meritor. It said (in the passage quoted above) that it would normally have committed the task of construing the ambiguous contract terms to the fact finder, in this case the District Court. But it did not do so. Nor did it construe the contract terms itself, as it could have on appeal from summary judgment. It looked only to the statutory purpose of a receivership, quoting the Congressional Conference Report to the following effect: "a conservator operates or disposes of an institution as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution". Apparently the Court felt that because a receiver is not supposed to initiate a corporate reorganization, his sale of the business as a going concern cannot be considered part of a reorganization for the purpose of documentary construction.

Second, the meaning of the word "reorganization". "Reorganization" has different meanings in different contexts. If the Court of Appeals had chosen to put itself in Meritor's shoes and ask what the word meant as used in the SPP, this is what it would have found:

Meritor was in trouble; its management was bending every effort to liquidate its fringe assets and maintain its banking business as a going concern in order to salvage value for the stockholders. Preserving the banking business depended on retaining the operating staff at a time when bank personnel were being tempted with offers of employment by other institutions. In the words of the

severance pay extension letters delivered to the Petitioners, "Meritor senior management is acutely aware that it is essential to retain motivated employees such as you in key positions".

The SPP was the instrument chosen by Meritor management to hold its crew together. The plan was promulgated by management and is to be construed against management. The employees are entitled to their benefits if they did what management wanted, i.e., if they stayed on the job until the job was eliminated by a corporate development that could reasonably be classified as a reorganization.

In this context, "reorganization" meant any reconfiguration that preserved the going concern value of the enterprise for the ultimate benefit of the stockholders. What eventuated under the Purchase and Assumption Agreement was essentially that. The banking business continued under the "PSFS" name, in the same locations, with the same customers. Its going concern value (good will) was reflected in the $180 million premium paid by the new owners. The old owners (i.e., the receiver and ultimately the Meritor stockholders) retained an interest in the business through the loss and profit sharing provisions.

One more issue remains. If this Court is satisfied that the transactions under the Purchase and Assumption Agreement constituted a reorganization, it may nevertheless ask how plaintiffs' unemployment can be attributable to that reorganization. After all, their unemployment resulted from the act of the Pennsylvania Secretary of Banking - who was not party to the Agreement.

The answer, *i.e.*, the connection between the Secretary and the Purchase and Assumption Agreement, is to be found in Chairman Seidman's testimony to the Congressional committee. Mr. Seidman told the Committee that the FDIC routinely attempts to locate buyers for failed banks as an alternative to paying out the insured deposits. He then described the procedure as it unfolded in the case of the National Bank of Washington, the case that led to the *NBW* litigation referred to in Part II above. Here is a paraphrase of Seidman's testimony:

> The takeover of NBW began when the Comptroller of the Currency (the counterpart of the Secretary of Banking) formally advised the FDIC that it would probably close NBW in the very near future and requested the FDIC to invite potential purchasers to evaluate the bank with the goal of submitting a bid to acquire the institution. The FDIC held a meeting, attended by eight potential bidders, to provide information and discuss the structure of a purchase and assumption agreement. Two of those banks performed due diligence reviews of NBW's operation, and one of them (Riggs) ultimately submitted a bid, which was accepted by the FDIC after negotiations concerning the amount and terms. The next day NBW was closed by the Comptroller of the Currency and the purchase and assumption agreement was signed and executed.

Mr. Seidman's testimony shows a concert of interest among the FDIC, the bank regulatory agency and the purchaser. It also shows cooperation between the bank regulatory agency and the FDIC as to the necessity for, and timing of, the bank closing. That concert of interest

and cooperation justifies viewing the individual actions as steps in a single transaction that qualifies as a reorganization for purposes of the SPP.

The Court of Appeals brushed aside the history of the SPP and the testimony of Mr. Seidman. In so doing it parted company with the opinion of this Court in *O'Melveny* and gave implicit approval to the action of Mr. Goodner in refusing severance pay out of hand and to the No Severance Policy under which Goodner was acting.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the issues presented by this petition.

Respectfully submitted,

ALICE W. BALLARD
LYNN MALMGREN

SAMUEL & BALLARD, P.C.
225 South 15th Street
Suite 1700
Philadelphia, PA 19102

Attorneys for Petitioners

Dated: December 22, 1995

Filed June 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1857

JOHN T. HENNESSY; MICHAEL B. HIGH; WILLIAM A. BRACKEN; LARRY GIBSON; MARTHA C. HITCHCOCK; LAURENCE A. LISS; KEN MANCINI; GEORGE S. RAPP; ROBERTA GRIFFIN TORIAN; FRANK J. SORIERO

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK
(D.C. Civil No. 93-cv-05589)

THOMAS CALLAHAN

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK
(D.C. Civil No. 94-cv-01949)

John T. Hennessy, Robert Griffin Torian, Michael B. High, William Bracken, Laurence Liss, Marty Hitchcock, George S. Rapp, Kenneth R. Mancini, Lawrence J. Gibson, Frank J. Soriero and Thomas Callahan.

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 93-cv-05589)

No. 94-1933

DAVID A. CAMPBELL, JR.; ROBERT F. HANNA; LESLIE VOTH; HELEN T. DEMARCO, individually, and

ROBERT F. HANNA; HELEN T. DEMARCO, on behalf of themselves and all others similarly situated, (SEPARATION PLAN CLASS), and

DAVID A. CAMPBELL, JR., on behalf of himself and all others similarly situated, (RETIREE HEALTH CLASS), and

DAVID A. CAMPBELL, JR.; ROBERT F. HANNA, on behalf of themselves and all others similarly situated, (LIFE INSURANCE CLASS)

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MERITOR SAVINGS BANK

David A. Campbell, Jr., Robert F. Hanna, Helen T. DeMarco and Leslie Voth,

Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 93-cv-03969)

No. 94-1934

JOSEPH A. ADOLF, LAURENCE J. ARNOLD, CHRISTIAN F. AURIG, GEORGE W. BARBER, LINDA C. BARCH, RICHARD F. BATE, OWEN J. BEHEN, LAUREN BETHEA, ELIZABETH L. BLANKHENHORN, ANNE MARIE BOBACK, SUSAN M. BROWN, JOHN J. BUCZEK, GEORGE S. BUNTING, MARY ANN C. BURCH, EDITH BURKEITT, THOMAS P. CALLAHAN, DAVID A. CAMPBELL, JR., KARLA J. CARNEY, JOHN M. CASAMENTO, JR., WILLIAM J. CATHCART, LISA CAVALLI, NANCY L. CEFFARATTI, JOSEPH D. CELLUCCI, ESTHER CERBO, CAROLE A. CIRCUCCI,

ANTHONY R. COOGAN, LARRY A. COOK, SAMUEL J. COOK, WALLACE P. COONEY, PAUL L. COPPOLA, LORENE C. COQUILLETTE, BETTY R. CORLEY, HARRIET S. CORLEY, JOAN T. CORSON, DAVID E. COVERDALE, MARY C. CRAIGE, LOIUS T. CULLEN, JOHN F. CULP, EDWARD D. CUSTER, MICHAEL CZINCILA, JOAN E. DEBES, IRENE V. DELIZZIO, GAIL L. DELVISCIO, HAROLD L. DEMPSEY, HAROLD C. DENGEL, DEBRA ANNE DENIGHT, BEATRICE L. DESHER, JOSEPH H. DEVORE, JR., ANNA S. DIFELICE, MARIO DIFELICE, MARY ANN DIGREGORIO, LEONID A. DOBRININ, SARAH S. DOODY, JOSEPH M. DUFFY, LEONARD T. EBERT, JOHN A. FATULA, CHARLES J. FERRIE, GEORGE W. FETTERS, JR., LORE L. FISHER, JOHN P. FOGARTY, CYNTHIA M. FORD, DORIS GAGLIARDI, BARBARA A. GIBSON, FRANCES J. GILLEN, WILLIAM R. GOETTLE, CHARLES W. GRAY, III, EUGENE A. HEIWIG, WILLIAM H. HILLIARD, WILLIAM H.H. HSU, STANLEY E. HUNT, CHARLES C. JONES, THOMAS C. KEISER, KATHLEEN F. KELLY, LYNN M. KELLY, ETHEL S. KEOWEN, JOHN ANDREW KINNERMAN, PHILIP W. KLINGER, C. ANDREW KREPPS, JR., JOHN DAVID LAMBERT, MICHAEL G. LEWIS, PATRICIA LEUTHY, SALVATORE LIZZIO, ALDO S. LOMBARDI, ELISABETH W. LORD, KATHLEEN LYNCH, E. DAVID MACNALLY, WILLIAM C. MACNEILL, JR., FRANK JOSEPH MARULLO, EDWARD M. MASON, JR., THOMAS G. MARVEL, RUTH A. MCALLISTER, JOSEPH F. MCCOLE, CHRISTINE D. MCCORMICK, PHILIP J. MCCORMICK, JANET B. MCCOURT, DAVID C. MELNICOFF, FREDA I. MILLAR, ANTHONY M. MINGARINO, JOSEPH J. MOFFA, LINDA LEE MONTANA, BARBARA L. MORGAN, MARION D. MORGAN, LEONARD V. MORRIS, DAVID D. MORRISON, MARY T. MURPHY, ANTHONY J.

NOCELLA, WILLIAM A. NORRIS, III, MARTHA K. NYLUND, MARY E. ORR, JOHN T. OSMIAN, CHARLES E. PADGETT, PATRICIA PAWLING, HOWARD F. PEARCE, CATHERINE P. PICCONE, PETER P. PRYZBYLKOWSKI, DARLENE E. PURUGGANAN, ELIZABETH L. RAFETTO, EDWARD W. RAPP, LUBA K. REILLY, LOUISE M. REITANO, ANTOINETTE D. RENDINO, MS. JAMIE RINDOCK, JEAN DAVIS ROBINSON, RICHARD ROGERS, DIANE S. ROHR, HERBERT A. ROTH, ANTHONY J. SANTILLI, JR., KATHLEEN M. SAWCHYNSKY, RUTH C. SCHMIDT, MICHAEL F. SCUTTI, MARTIN SELGRATH, JOHN W. SEMPLE, JOSEPH F. SLANE, ROBERT A. SMALLEY, ELIZABETH K. SONNEBORN, FRED B. STASS, WALTER R. STAPLES, ROBERT C. STEINMAN, ARTHUR W. STETTLER, JEAN J. STUBBS, ANTHONY TABASCO, ROBERT B. TAYLOR, ANNITA L. TEDESCO, KENNETH C. THOMAS, PATRICIA E. THOMPSON, DIANNE T. TINDALL, JAMES M. TOOLAN, MORRIS VARANO, STANLEY J. VERBEEK, DONNA VOLZ, LESLIE C. VOTH, THERESA M. WEBB, CYNTHIA WEST, ROBERT B. WHITELAW, ALTON T. WINNER, JR., ANNE M. WISE, VERDELLA WRIGHT, ANTHONY J. ZONGARO AND LINA G. ZANONI.

Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 94-cv-01499)

Argued May 16, 1995

Before: COWEN, LEWIS and GARTH, *Circuit Judges*

(Filed June 29, 1995)

Alice W. Ballard (argued)
Samuel & Ballard
225 South 15th Street
Suite 1700
Philadelphia, PA 19102

COUNSEL FOR APPELLANTS
in No. 94-1857

Harry C. Barbin (argued)
Barbin, Lauffer & O'Connell
608 Huntingdon Pike
Rockledge, PA 19046

COUNSEL FOR APPELLANTS
in No. 94-1933

Harry C. Barbin (argued)
William M. O'Connell
Barbin, Lauffer & O'Connell
608 Huntingdon Pike
Rockledge, PA 10046

COUNSEL FOR APPELLANTS
in No. 94-1934

Jaclyn C. Taner (argued)
Federal Deposit Insurance
Corporation
550 17th Street, N.W.
Washington, DC 20429

COUNSEL FOR APPELLEE
Federal Deposit Insurance
Corporation as Receiver
for Meritor Savings Bank

OPINION OF THE COURT

COWEN, *Circuit Judge:*

Plaintiffs in these related cases, former employees and managers of Meritor Savings Bank, appeal from three orders of the district court that granted summary judgment in favor of the defendant, the Federal Deposit Insurance Corporation ("FDIC"), on their claims to recover severance pay, medical benefits, and life insurance benefits pursuant to the terms of their employee welfare benefit plans. The issues raised in these appeals are whether the district court erred in determining that: (1) the FDIC's takeover and sale of Meritor was not a reorganization for purposes of the plaintiffs' separation pay plan; (2) the discharge of Meritor employees did not constitute "job elimination" or "lack of work" triggering severance payments; (3) the plaintiffs had no vested right to severance pay; (4) the FDIC properly exercised its repudiation powers; (5) the plaintiffs did not incur "actual direct compensatory damages" as provided in 12 U.S.C. § 1821(e)(3); (6) the FDIC properly terminated life and health insurance benefits pursuant to the termination provisions in these employee welfare benefit plans; (7) the FDIC was not liable for a statutory penalty under 29 U.S.C. § 1132(c)(1) as a result of its failure to respond in a timely manner to plaintiffs' request for plan documents; and (8) the certification of three plaintiff classes was inappropriate. Because we conclude that the district court did not err in granting summary judgment to the FDIC on plaintiffs' claims for separation pay, health insurance

benefits, and life insurance benefits, we will affirm the orders of the district court. Further, because we conclude that the district court did not abuse its discretion in finding that the FDIC is not liable for the statutory penalty prescribed by 29 U.S.C. § 1132(c), we will affirm the order of the district court pertaining to this issue. Finally, because of our conclusion on the merits, that the district court did not err in granting summary judgment for the FDIC, we need not reach the class certification issues.

I. FACTS & PROCEDURAL HISTORY

On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania issued an order declaring Meritor Savings Bank ("Meritor") insolvent and directing that the bank be closed. On the same day, the FDIC was appointed as receiver for the insolvent bank. As receiver, the FDIC executed a Purchase and Assumption Agreement with Mellon Bank ("Mellon") transferring a portion of Meritor's assets and liabilities to Mellon. The FDIC retained the liabilities not assumed by Mellon, along with the unpurchased Meritor assets, which the FDIC proceeded to liquidate for the benefit of Meritor's approved creditors.

The record demonstrates that until the Secretary of Banking declared the bank insolvent, Meritor maintained a separation pay plan ("SPP"), a retiree health insurance plan (the Meritor Medical Plan 65 Special Option or "65 Special"), and a retiree life insurance plan (the Meritor

Group Life Insurance Plan or "MGLIP").[1] Under the SPP, eligible employees were entitled to severance pay based on their years of service and salary, up to a maximum benefit of twenty-six weeks. Benefits were payable for involuntary termination due to "lack of work, job elimination, reorganization or reduction-in-force." Campbell App. at 139a. No benefits would be paid if separation resulted from sale or disposition of a portion of Meritor's assets and the employee was employed by the successor entity. *Id.*

The SPP was "unfunded," meaning all benefits were paid from the general assets of Meritor. *Id.* at 141a. Meritor retained sole authority to determine whether a separation entitled an employee to benefits. *Id.* Moreover, Meritor expressly reserved the right to modify or discontinue the SPP in whole or in part at any time. *Id.* at 137a.

Under the 65 Special, Meritor provided group health insurance coverage for its retirees. *Id.* at 406a. The 65 Special was a self-insured plan that qualified as an employee welfare benefit plan under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ("ERISA"). The MGLIP, also an employee welfare benefit plan under ERISA, provided retirees with death benefit coverage equal to the lesser of $50,000 or 25% of the amount of death benefit coverage

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[1] The parties stipulated to the material facts in these cases. Statement of Undisputed Facts, Hennessy App. at 187-95; Joint Statement of Undisputed and Disputed Facts Regarding Motions for Summary Judgment, Campbell App. at 403a-70a; Joint Statement and Joint Supplemental Statement of Disputed and Undisputed Facts, Adolph App. at 367a-437a.

for which they were insured immediately prior to retirement. *Id.* at 405a-06a.

Meritor explicitly reserved the right to terminate the 65 Special and the MGLIP at any time. The health plan provided:

> Meritor intends the plan to be permanent, but since future conditions affecting your employer cannot be anticipated or foreseen, Meritor reserves the right to amend, modify or terminate the plan at any time, which may result in the termination or modification of your coverage. Expenses incurred prior to the plan termination will be paid as provided under the terms of the plan prior to its termination.

Id. at 165a (emphasis omitted). The life insurance plan provided:

> Meritor reserves the right to terminate the group life insurance policy for its employees and retirees at any time, if Meritor determines that such termination is in its best interests. If Meritor terminates its group life insurance policy, employees and retirees who die after the effective date of the termination . . . will not have any life insurance.

Id. at 152a.

On the day the Secretary declared Meritor insolvent, a meeting was held to discuss the status of Meritor's employees. At that meeting, Jack Goodner, the FDIC's closing manager, made a brief presentation. When he finished his remarks, an employee asked him whether severance benefits would be paid. Goodner thought not, but was not sure. After looking towards two other FDIC

officials for guidance, Goodner responded "no." At the close of business on December 11, 1992, the former Meritor employees became employees of Keytech Resources, Inc., a firm established to provide staffing for the former Meritor offices purchased by Mellon. Mellon paid severance benefits to the employees who were subsequently laid off based on their years of service to Meritor, up to a maximum of four weeks salary.

On the Monday following the events of Friday, December 11, 1992, the former branches of Meritor opened for business as usual under the name of Mellon-PSFS without interruption of business to regular customers. The FDIC subsequently repudiated the SPP pursuant to its powers under 12 U.S.C. § 1821(e). The FDIC did not repudiate either the 65 Special or the MGLIP plans. Instead, the FDIC sent letters to the former employees and retirees of Meritor notifying them that their health and life insurance plans were terminated effective December 31, 1992 pursuant to the terms of each plan.[2] Those letters advised the employees about the availability of FDIC-sponsored continuing medical coverage, and also provided specific instructions for filing claims for benefits under the FDIC's statutory claims process, alerting the employees and retirees to a March 19, 1993 bar date for filing claims against the assets of the receivership.

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[2] Consistent with the above facts, when we use the term "repudiation," we are referring to the statutory power of a receiver under 12 U.S.C. Sec. 1821(e) to refuse to recognize a contract. "Termination," by contrast, refers to the discontinuing of a plan pursuant to the plan's own terms.

A. *The Hennessy Plaintiffs*

The Hennessy plaintiffs are former managers of Meritor. They filed suit in the Eastern District of Pennsylvania alleging the right to recover severance pay pursuant to the terms of the SPP. In support of their claim, they rely on the above-stated facts and the fact that, prior to the FDIC's takeover of Meritor, each of them received a letter from Meritor's Chairman, Roger Hillas, stating:

> Meritor senior management is acutely aware that [it] is essential to retain motivated employees such as you in key positions.
>
> As evidence of this awareness, Meritor is extending the severance benefit provided to you under the Separation Pay Program to a total of 52 weeks pay. This enhanced benefit will be payable under the same terms and conditions as provided for in the Separation Pay Program if you are separated from employment by Meritor anytime on or before December 31, 1992.

Letter from Hillas to John Hennessy (October 3, 1990); Hennessy App. at 68. The Hennessy plaintiffs argued before the district court that their severance rights under the SPP were activated when "they were terminated as part of a reorganization." *Hennessy v. FDIC*, 858 F.Supp. 483, 487 (E.D.Pa.1994).

The district court rejected the Hennessy plaintiffs' argument. The court explained that the FDIC sold Meritor to Mellon and was in the process of liquidating the rest of Meritor's assets. *Id.* The court reasoned that because the FDIC was involved with the termination of Meritor, rather than the continuation of its business, there was no reorganization. *Id.*

In the alternative, the *Hennessy* plaintiffs argued before the district court that given the FDIC's repudiation of the SPP, the plaintiffs should be able to recover severance pay pursuant to 12 U.S.C. § 1821(e)(3) which provides for compensation for actual direct compensatory damages attributable to a repudiation. *Id.* at 488-89. The district court disagreed. Relying on the decision of the Court of Appeals for the First Circuit in *Howell v. FDIC*, 986 F.2d 569 (1st Cir.1993), the district court determined that severance payments are not actual direct compensatory damages under § 1821(e)(3). *Id.* at 489. Accordingly, the district court granted summary judgment in favor of the FDIC. *Id.* at 485. This appeal followed.

B. *The Campbell Plaintiffs*

The Campbell plaintiffs include: (1) David Campbell, Jr., an employee who retired from Meritor effective December 1, 1987; (2) Robert Hanna, Helen DeMarco, and Leslie Voth, employees who were employed by Meritor on December 11, 1992; and (3) potential plaintiff classes comprised of the above named plaintiffs and those similarly situated. The Campbell plaintiffs filed claims for benefits with the FDIC. The FDIC, however, rejected these claims.

Subsequent to the FDIC's denial of their claims, the Campbell plaintiffs filed suit in the United States District Court for the Eastern District of Pennsylvania. In their complaint, plaintiffs Hanna and DeMarco sought severance payment pursuant to the SPP. Plaintiff Campbell sought a declaration that he and other similarly situated persons are entitled to health insurance coverage under

the 65 Special. Campbell also sought reimbursement with interest for health insurance premiums paid since December 11, 1992. In addition to these claims, plaintiffs Campbell and Hanna sought a declaration that they and other similarly situated persons are entitled to life insurance under the MGLIP. They also sought reimbursement with interest for life insurance premiums paid since December 11, 1992. Finally, plaintiffs Campbell, Hanna, Voth and DeMarco sought a monetary penalty under ERISA for the FDIC's failure to provide in a timely manner information requested by their counsel.[3]

The district court denied Hanna and DeMarco's claims for severance pay under the SPP for the reasons set forth in its decision in *Hennessy. Campbell v. FDIC*, No. CIV A.93-3969, 1994 WL 475067, at *4 (E.D. Pa. Aug. 29, 1994). In addition, the court found that it did not have jurisdiction to hear the claims brought by Campbell or Voth because these claims were filed prematurely.[4] *Id.* Nevertheless, the court concluded that even if it had jurisdiction to hear Campbell's claims for health and life insurance benefits, these claims would fail because the

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[3] Plaintiffs' counsel sent an ERISA document request to the FDIC on March 16, 1993. The FDIC did not respond to the ERISA document request until September 21, 1993, 189 days after the initial request.

[4] The court concluded that Campbell's and Voth's claims were premature because these plaintiffs did not wait the requisite 180 days after filing their claims with the FDIC before filing their actions in district court. *Campbell*, 1994 WL 475067, at *4. The court noted, however, that Campbell and Voth were added as individual plaintiffs in the *Adolph* case by the filing of the First Amended Complaint in that case and thus these plaintiffs asserted a timely filing in *Adolph*. *Id.* at *7 n. 7.

FDIC terminated both the 65 Special and the MGLIP pursuant to its contractual rights. *Id.* Finally, the district court granted summary judgment in favor of the FDIC on the plaintiffs' claims for a statutory penalty because it concluded that: (1) the statutory penalty should not apply to the FDIC, an agency of the federal government; or (2) even if the statutory requirement does apply to the FDIC, the court would exercise its discretion under 29 U.S.C. § 1132(c) and award no penalty in this case. *Id.* at *7.

With respect to the potential class claims, the district court denied plaintiffs' motion to certify a separation pay plan class, a retiree health class, and a life insurance class. *Campbell v. FDIC*, No. 93-3969 (E.D. Pa. June 30, 1994) (order denying class certification). The court determined that the plaintiffs could not satisfy all four of the threshold requirements of Rule 23(a) of the Federal Rules of Civil Procedure for certifying a plaintiff class. *Id.* at 5, 7, 8. In addition, the district court found that class certification under Rule 23(b)(1) or Rule 23(b)(2) would be inappropriate. *Id.* at 9. This appeal followed.

C. *The Adolph Plaintiffs*

The Adolph plaintiffs are a group of 161 former Meritor employees and retirees.[5] In their complaint, also filed in the United States District Court for the Eastern District of Pennsylvania, the employee plaintiffs challenged the repudiation of the SPP by the FDIC. The

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[5] On July 22, 1994 the district court entered an order granting the plaintiffs' unopposed motion to amend the complaint in this matter to add David Campbell and Leslie Voth as plaintiffs.

retiree plaintiffs challenged the termination of their medical benefits under the 65 Special. In addition, both the employee and retiree plaintiffs challenged the termination of the MGLIP. The FDIC and the Adolph plaintiffs filed motions for summary judgment on July 26, 1994. The district court granted summary judgment for the FDIC for the reasons detailed in *Hennessy* and *Campbell*. *Adolph v. FDIC*, No. 94-1499 (E.D. Pa. Aug. 29, 1994) (order granting summary judgment). This appeal followed.

II. JURISDICTION

These cases commenced under the Financial Institutions Reform, Recovery and Relief Act of 1989 ("FIRREA") and ERISA. The district court's jurisdiction was predicated upon 28 U.S.C. § 1331. We have jurisdiction over the instant appeals pursuant to 28 U.S.C. § 1291. We exercise plenary review over a grant of summary judgment. Because the material facts in this matter are not in dispute, we review only for errors of law. As to the Campbell plaintiffs' argument that an ERISA penalty should be assessed pursuant to 29 U.S.C. § 1132(c)(1), our review is for abuse of discretion.

III. SEVERANCE PAY

A. Was there a Reorganization?

The Hennessy plaintiffs' first contention is that Meritor was "reorganized," triggering a right to severance payments under the terms of the SPP. According to these

plaintiffs, Mellon Bank acquired Meritor as a going concern following the FDIC's takeover of Meritor. The Hennessy plaintiffs point out that Meritor's offices opened for business as usual on the next business day after the takeover under the trademark "Mellon-PSFS." They assert that because Meritor continued as a going concern without interruption of business, they have a right to severance payments under the terms of the SPP.

We are unpersuaded by this argument. The written terms of the SPP provide that:

> If the Employee is involuntarily terminated for organizational reasons associated with lack of work, job elimination, *reorganization*, or reduction in force . . . he/she will be eligible to receive bi-weekly separation payments and benefit continuation as outlined in Section IV of the Plan Document.

Meritor Separation Pay Program (effective November 1, 1989): Campbell App. at 129a (emphasis added). The district court determined that both the facts and the law in this case did not support the conclusion that the Hennessy plaintiffs were terminated as part of a reorganization. *Hennessy*, 858 F. Supp. at 487. It reasoned that the FDIC's takeover and sale of a bank's assets constituted a termination of the bank's business, not a continuation of this business. *Id.* We agree with the determination of the district court.

A receiver, unlike a conservator, does not have as its purpose the preservation of an institution as a going concern. *Resolution Trust Corp. v. CedarMinn Bldg. Ltd. Partnership*, 956 F.2d 1446, 1454 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 94 (1992). Receivers have the power to

liquidate and wind up the affairs of an institution. *Id.* (citing *FDIC v. Grella*, 553 F.2d 258, 261 (2d Cir. 1977)). As the Court of Appeals for the Eighth Circuit has recognized, this distinction was emphasized in the Conference Report accompanying FIRREA, which stated:

> The title . . . distinguishes between the powers of a conservator and receiver, making clear that a conservator operates or disposes of an institution as a going concern while a receiver has the power to liquidate and wind up the affairs of an institution.

Id. (quoting H.R. Conf. Rep. No. 209, 101st Cong., 1st Sess. 398 (1989)).

The Secretary of Banking for the Commonwealth of Pennsylvania closed Meritor Savings Bank. The FDIC was appointed receiver and it sold some of Meritor's assets to Mellon. As part of this transaction, Mellon agreed to assume some of Meritor's liabilities. The FDIC proceeded to liquidate the remaining assets of Meritor for the benefit of Meritor's creditors. These actions are commensurate with the winding up of a failed bank's affairs and the proper function of a receiver. To suggest that these actions constituted a reorganization of Meritor is to turn a blind eye to the dispositive facts. We therefore cannot conclude that the district court erred in its determination that Meritor did not undergo a reorganization that would trigger plaintiffs' rights to severance pay.

B. "Job Elimination" or "Lack of Work"

Rather than arguing that Meritor was reorganized, the Adolph and Campbell plaintiffs suggest that under

the terms of the SPP, "job elimination" or "lack of work" triggered the receiver's obligation to pay severance benefits. According to these plaintiffs, the district court failed to adequately consider this argument when it simply relied on its discussion in *Hennessy* to grant summary judgment in favor of the FDIC in the *Campbell* and *Adolph* cases.[6] The Adolph and Campbell plaintiffs assert that because the FDIC, as receiver, stands in the shoes of Meritor, it must provide separation benefits pursuant to the written terms of the SPP.

This argument also misses the mark. As stated above, the written terms of the SPP provide:

> If the Employee is involuntarily terminated for organizational reasons associated with *lack of work, job elimination,* reorganization, or reduction in force . . . he/she will be eligible to receive bi-weekly separation payments and benefit continuation as outlined in Section IV of the Plan Document.

Meritor Separation Pay Program (effective November 1, 1989); Campbell App. 129a (emphasis added). Job elimination, however, is defined by the plan to be if "as a result of a reorganization, changing business needs, or the sale, closure or relocation of an office, a specific position is determined to be unnecessary to the company for an indefinite period of time." *Id.* at 128a. The Secretary of Banking's shutdown of Meritor and the appointment of the FDIC as receiver was not "reorganization, changing business needs, or the sale, closure or relocation

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[6] The district court's discussion in *Hennessy* did not specifically address this argument.

of an office." It was the shutdown of the entire bank. Further, no specific position was "determined to be unnecessary to the company for an indefinite period of time." Rather, Meritor ceased to exist, and the employment of all employees (not specific positions) was terminated permanently. We therefore cannot conclude that "job elimination" triggered a right to severance pay.

Similarly, we cannot conclude that a "lack of work," as defined by the plan, triggered the right to severance benefits. Lack of work is defined by the plan to be if "as a result of a decrease in volume of work to be done, a position is *temporarily* not needed." *Id.* at 128a (emphasis added). The facts of this case do not support the view that a position was "temporarily not needed." The Secretary of Banking closed the entire bank and declared Meritor insolvent. We therefore fail to see how the Campbell and Adolph plaintiffs have demonstrated a "lack of work" as the plan defines that phrase. Accordingly, we are unpersuaded that the district court erred in failing to find this argument a sufficient basis upon which to ground a claim for severance benefits.[7]

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[7] The Hennessy plaintiffs did not rely on "job elimination" or "lack of work" as a basis for recovery in their briefs before this Court. At oral argument, however, counsel for the Hennessy plaintiffs stated that she believed that "job elimination" or "lack of work" would be an alternative grounds of recovery for her clients. Further, she stated that the plan document containing the definitions of "job elimination" and "lack of work" received by the Campbell and Adolph plaintiffs was not received by the Hennessy plaintiffs.

While the Hennessy plaintiffs' argument along these lines raises certain questions about which plan documents are applicable to them, we need not decide these questions because of

C. Did plaintiffs' right to severance pay vest?

Using slightly different approaches, the Hennessy plaintiffs, and the Campbell and Adolph plaintiffs, next argue that their rights to severance pay were "fixed and unconditional" when the receiver was appointed. Based on certain language in the Court of Appeals for the First Circuit's opinion in *Kennedy v. Boston-Continental National Bank*, 84 F.2d 592 (1st Cir. 1936), the Hennessy plaintiffs argue that their rights to severance benefits vested *on the day that Meritor closed its doors and went into receivership.* The Campbell and Adolph plaintiffs, by contrast, assert that the Meritor employees had fixed, enforceable contract rights to severance pay *throughout the term of their employment* as the result of their total compensation package. According to the Campbell and Adolph plaintiffs, the only contingent aspect of their right to severance pay was the amount of the benefits to be paid, an amount that was tied to each employee's salary and years of service. These plaintiffs cite *Citizens State Bank of Lometa v. FDIC.*, 946 F.2d 408, 415 (5th Cir. 1991), and that case's analysis of a standby letter of credit, to support their argument.

We find these arguments unconvincing. The rights and liabilities of a bank and the bank's debtors and creditors are fixed as of the date of the declaration of a bank's insolvency. *American Nat'l Bank of Jacksonville v. FDIC*, 710 F.2d 1528, 1540 (11th Cir. 1983) (citing *First Empire Bank v. FDIC*, 572 F.2d 1361, 1367-68 (9th Cir.), *cert. denied*, 439 U.S. 919, 99 S.Ct. 293 (1978)); *FDIC v. Grella*,

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our determination, *see infra* part III.D., that the FDIC repudiated the SPP.

553 F.2d 258, 262 (2d Cir. 1977); *Kennedy*, 84 F.2d at 597). To establish a claim against an insolvent bank in receivership, the liability of the bank must have accrued and become unconditionally fixed on or before the time it is declared insolvent. *Kennedy*, 84 F.2d at 597 (citations omitted). As the Court of Appeals for the First Circuit has stated:

> The amount of a claim may be later established, but it must be the amount due and owing at the time of the declaration of insolvency. . . . If nothing is due at the time of insolvency, the claim should not be allowed. . . .

Id.; see also Dababneh v. FDIC, 971 F.2d 428, 434 (10th Cir. 1992) (courts analyze "provability" of claims and creditors possess "provable" claims only if claims are "in existence before insolvency") (quoting *FDIC v. Liberty Nat'l Bank*, 806 F.2d 961, 965 (10th Cir. 1986)).

The language that the Hennessy plaintiffs cite in *Kennedy* is not to the contrary. To support their argument, the Hennessy plaintiffs point to language in *Kennedy* that states:

> Had the lease contained a covenant that insolvency shall be breach of the lease and thereupon, without any further action by the lessor, the lease shall terminate and the lessor shall be entitled forthwith to damages measured as provided in the covenant of the lease for liquidated damages, then, on the declaration of insolvency, no doubt a claim would arise and be matured by the agreement for liquidated damages . . . so that the claim would be provable in bankruptcy.

Kennedy, 84 F.2d at 597 (citations omitted). Aside from the fact that the Hennessy plaintiffs' position ignores the holding of *Kennedy* – that the claim for failure to rent in that case was too contingent and uncertain to support liability – these plaintiffs have made no showing that insolvency itself triggered their rights under the SPP. The terms of the SPP do not provide that a declaration of insolvency triggers payment of severance benefits. Accordingly, their right to severance benefits was still contingent at the time of the appointment of the receiver.

The Campbell and Adolph plaintiffs' right to severance pay was likewise contingent, and their reliance on *Citizens State Bank of Lometa* is unavailing. In *Lometa*, the Court of Appeals for the Fifth Circuit held that claims that "originated" from standby letters of credit issued before the bank became insolvent passed the "provability test" even though the triggering event obligating the bank to pay did not occur until after the bank became insolvent. *Lometa*, 946 F.2d at 415. The court in *Lometa*, however, explained that standby letters of credit are not contingent liabilities; they are loans. *Id.* at 414. Therefore, such letters are not directly comparable to a severance pay plan under which no vested benefits accrue until a contingency is fulfilled. Accordingly, we remain unconvinced that the plaintiffs had a vested right to benefits prior to, or at the time of, the appointment of the receiver.

D. Repudiation

Having determined that there was no event that triggered the payment of severance benefits, it would ordinarily be unnecessary to dispose of the other issues

raised by the parties regarding their entitlement to severance pay, *i.e.*, repudiation and whether the failure to pay severance benefits constituted actual direct compensatory damages under FIRREA. However, the parties have forcefully argued their positions regarding the various "triggering" provisions, and have at least implied that they are susceptible to more than one reasonable interpretation. We would normally commit the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced. We do not do so here because even if we were to assume a triggering event had occurred, we would nonetheless affirm the district court's grant of summary judgment in favor of the FDIC because the FDIC repudiated the SPP pursuant to its statutory authority under 12 U.S.C. § 1821. *See PACC v. Rizzo*, 502 F.2d 306, 308 n. 1 (3d Cir. 1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 780 (1975) (we can affirm the district court on any ground).

The Hennessy, Campbell, and Adolph plaintiffs all allege that following the FDIC's appointment as receiver, the FDIC did not properly repudiate the SPP pursuant to the statutory requirements found at 12 U.S.C. § 1821(e)(1). According to the plaintiffs, 12 U.S.C. § 1821(e)(1) requires the FDIC to make formal findings that the terms of the SPP were "burdensome" and that repudiation is necessary in order to "promote the orderly administration of the institution's affairs." The plaintiffs argue that the FDIC made no such formal findings in this case and therefore any repudiation of the SPP was ineffective. Further, the Hennessy plaintiffs argue that the

FDIC improperly relied on an undisclosed policy of denying all claims for severance benefits in repudiating the SPP.[8]

The provisions governing a receiver's authority to repudiate contracts can be found at 12 U.S.C. § 1821(e). Section 1821(e) states, in pertinent part:

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[8] In addition to this procedural argument, the Hennessy plaintiffs suggest that the FDIC's repudiation power is limited to executory contracts. These plaintiffs cite *LaMagna v. FDIC*, 828 F.Supp. 1 (D.D.C. 1993) in support of their position.

In *LaMagna*, the district court determined that an employment agreement which provided for severance pay was nonexecutory once the employee had rendered his services by working for one year. *Id.* at 2-3. The court concluded that such nonexecutory contracts may not be repudiated by the FDIC pursuant to FIRREA. *Id.*

We are unpersuaded by the district court's reasoning in *LaMagna*. The district court's conclusory holding that § 1821(e) does not permit the receiver to repudiate a "nonexecutory" contract lacks support in both the statutory language and the case law. As many courts have noted, the statute explicitly provides that a conservator or receiver "may disaffirm *any* contract or lease," not just executory contracts. *E.g., Employees' Retirement System of Alabama v. Resolution Trust Corp.*, 840 F. Supp. 972, 984 (S.D.N.Y. 1993) (quoting § 1821(e)(1)(A)) (emphasis in original). This provision is in sharp contrast to the Bankruptcy Code which specifically refers only to the trustee's power to reject executory contracts. *See Morton v. Arlington Heights Fed. Sav. & Loan Ass'n*, 836 F. Supp. 477, 481-82 (N.D.Ill. 1993); *Employees' Retirement System of Alabama*, 840 F. Supp. at 984 (noting marked contrast with the Bankruptcy Code which gives a trustee in bankruptcy the power to "assume or reject any *executory* contract." (quoting 11 U.S.C. § 365(a))). Because Congress provided no such limitation here, we are unable to conclude that the FDIC's power of repudiation is limited only to executory contracts.

> (1) Authority to repudiate contracts
>
> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease –
>
> (A) to which the institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1) (Supp. V 1993). Section 1821(e) does not set forth a specific procedure for a receiver to follow in repudiating a contract. Indeed, section 1821(e) leaves the decision as to whether repudiation is "burdensome" and "necessary to promote the orderly administration of the institution" to the receiver's discretion so long as repudiation is accomplished within "a reasonable period" following the receiver's appointment. 12 U.S.C. § 1821(e)(2).

Courts have refused to read into this statutory language any requirement for formal findings in support of a decision to repudiate. In addressing this precise issue in a case involving a receiver's obligation to pay rent, the Court of Appeals for the Second Circuit recently stated:

> First, there is no requirement that the conservator or receiver make a formal finding that a lease or contract is burdensome. Second, it can

> hardly be said that it was not reasonable for the [receiver] to find that it would be burdensome for it to assume a $7 million obligation to pay rent on premises for which it no longer had use, at a time when the real estate market was declining. Third, whether the lease is burdensome is to be decided at the discretion of the conservator or receiver. 12 U.S.C. § 1821(e)(1)(B).

1185 Avenue of the Americas Assocs. v. Resolution Trust Corp., 22 F.3d 494, 498 (2d Cir.1994). The court went on to uphold the district court's grant of summary judgment in favor of a receiver that claimed that it had repudiated a lease. *Id.; see also Morton,* 836 F.Supp. at 485 ("The statute does not require that the receiver give reasons for repudiating a contract. . . . "); *Jenkins-Petre Partnership One v. Resolution Trust Corp.*, No. Civ.A. 91-A-637, 1991 WL 160317, at *5 (D.Col. Aug. 13, 1991) ("The FIRREA statute does not provide that the [receiver] explain its actions or that a court may review the basis for that decision.").

We see no reason to depart from this line of cases. The claimants have failed to demonstrate that the SPP, which provided no benefit to the receivership, but which called for millions of dollars in payments, should not be considered "burdensome." In addition, we conclude that there is no basis in the statute or in the case law for requiring the FDIC, which has discretion in making the decision concerning whether to repudiate, to produce written findings.

Nor do we find merit in the Hennessy plaintiffs' argument that the FDIC's repudiation is invalid because it was carried out pursuant to an undisclosed policy. We

fail to comprehend how a consistent denial of the same type of claim constitutes an abuse of the FDIC's discretion. If anything, such a longstanding policy demonstrates a conscious decision to promote uniform treatment of similar claims. Accordingly, we cannot conclude that the district court erred in determining that the FDIC's repudiation was not procedurally defective.

E. Actual Direct Compensatory Damages

The three sets of plaintiffs next argue that even if the FDIC did properly repudiate the SPP, they are entitled to severance benefits as actual direct compensatory damages under 12 U.S.C. Sec. 1821(e)(3). The plaintiffs assert that severance pay in the context of at will employment represents additional compensation for entering into such a relationship and is therefore a compensable loss if not paid. The plaintiffs rely on the decision of the Court of Appeals for the District of Columbia Circuit in *Office and Professional Employees Int'l Union, Local 2 v. FDIC, as Receiver of Nat'l Bank of Washington ("NBW")* 27 F.3d 598 (D.C.Cir.1994), to support their position.

While the question is close, we remain unconvinced by the plaintiffs' argument. FIRREA provides, in pertinent part, that:

> the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be –
>
> > (i) limited to actual direct compensatory damages; and
> >
> > (ii) determined as of –

> (I) the date of the appointment of the conservator or receiver; . . . .

12 U.S.C. Sec. 1821(e)(3)(A) (Supp. V 1993). The statute states, however, that the term "actual direct compensatory damages" does not include:

> (i) punitive or exemplary damages;
>
> (ii) damages for *lost profits or opportunity;* or
>
> (iii) damages for pain and suffering.

12 U.S.C. Sec. 1821(e)(3)(B) (Supp. V 1993) (emphasis added). The courts are split over the proper interpretation of these provisions. The Court of Appeals for the First Circuit has determined that the phrase "actual direct compensatory damages," does not include severance payments stipulated in advance. *Howell v. FDIC*, 986 F.2d 569, 573 (1st Cir.1993). According to that court, such payments are "at best an estimate of likely harm made at a time when only prediction is possible" and are analogous to "liquidated damages." *Id.* That court reasoned that because those employees entitled to severance pay "may, or may not, have suffered injury," depending on the employment options they had in the past and the options available now, and because "[c]onceivably," such employees could have suffered "no damage at all," severance payments of this type do not fit within the language of the statute. *Id.; see also Resolution Trust Corp. v. Management, Inc.*, 25 F.3d 627, 632 (8th Cir.1994) ("Neither severance fees nor future lost profits are compensable under FIRREA."); *Westport Bank & Trust Co. v. Geraghty*, 865 F.Supp. 83, 86 (D.Conn.1994) ("Courts have found that damages resulting from the repudiation of a severance

package are not 'actual direct compensatory damages' within the meaning of Sec. 1821 because they are analogous to liquidated damages."); *Aguilar v. FDIC*, No. 92-4286 (RR), slip op. at 15-16 (E.D.N.Y. Oct. 4, 1993) (noting that courts have been unwilling to permit plaintiffs to recover amounts more akin to liquidated than compensatory damages); *Lanigan v. Resolution Trust Corp.*, No. 91-7216, 1993 WL 792085, slip op. at 5-7 (N.D.Ill. March 30, 1993) (relying on the reasoning in *Howell*).

As the plaintiffs point out, however, the Court of Appeals for the District of Columbia Circuit has taken a different view. In *NBW*, a case involving a collective bargaining agreement between the National Bank of Washington and its employees, the court of appeals determined that in the context of an at will employment relationship, severance payments are "properly characterized as consideration for entering into (or continuing under) the employment contract and therefore are compensable as actual damages under FIRREA." *NBW*, 27 F.3d at 604. Rejecting the "liquidated damages" analogy used by the Court of Appeals for the First Circuit, the court determined that the FDIC was liable for severance payments. *Id.* at 604-05.

In addition to being confronted with division amongst the courts, we must contend with competing policy considerations. On the one hand, we have the concern raised in *Howell* that in drafting FIRREA, "Congress, faced with mountainous bank failures," was "determined to pare back damage claims founded on repudiated contracts." *Howell*, 986 F.2d at 572. On the other hand, we must address the point raised in *NBW* that the question is not whether Congress meant to scale

back damage claims, but "which damage claims, however few, are preserved." *NBW*, 27 F.3d at 604. Moreover, we are cognizant of the fact that disallowance of promised severance pay may chill a troubled bank's ability to effectively retain able employees. *See Howell*, 986 F.2d at 573.

We share the view of the Court of Appeals for the First Circuit that these payments are analogous to "liquidated damages." We therefore agree with the position of the district court in this case that these damages are not compensable as "actual direct compensatory damages" under 12 U.S.C. Sec. 1821.[9] Accordingly, we will affirm the order of the district court granting summary judgment to the FDIC on the issue of separation pay.

IV. TERMINATION OF HEALTH AND LIFE INSURANCE BENEFITS

The Campbell and Adolph plaintiffs next allege that the district court erred in granting summary judgment against them on their claims for health and life insurance

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[9] In reaching this decision, we are not unmindful of the *Hennessy* plaintiffs' argument that under the terms of this severance pay plan, benefits are actually accelerated if the discharged employee finds other employment. *Hennessy* App. at 106 ("If you are otherwise qualified for separation payments and then become employed during the benefit payment period . . . [y]ou will then receive a single-sum cash payment equal to the remaining separation pay to which you would have been entitled had you remained unemployed."). Nevertheless, we believe that the function of these provisions is to articulate the timing of the payment of benefits rather than to relate the purpose behind the SPP.

benefits pursuant to the 65 Special and the MGLIP.[10] According to these plaintiffs, the district court erred in determining that the provisions of Sec. 402(b)(3) of ERISA, 29 U.S.C. Sec. 1102(b)(3), requiring that every employee benefit plan provide a "procedure for amending such plan," apply only to plan amendments and not to plan terminations. These plaintiffs argue that because the FDIC did not follow the proper "procedure" in terminating their life and health insurance benefits, the FDIC should be responsible for these benefits until such time as the FDIC complies with ERISA. They suggest that a remand is appropriate to decide this question.

Relying on our previous decision in *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir.1994), the district court held that when a party seeks to terminate an ERISA plan, there is no requirement that the ERISA plan have a termination procedure. *Campbell*, 1994 WL 475067, at *5. Subsequent to the district court's opinion in this matter, however, the Supreme Court reversed our panel's decision in *Schoonejongen. Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S.Ct. 1223 (1995). Following that reversal, we decided the case of *Ackerman v. Warnaco, Inc.*, No. 94-3527, 1995 WL 289682 (3d Cir. May 15, 1995). In that case, we explicitly held that Sec. 402(b)(3) of ERISA applies to plan terminations as well as plan amendments. *Ackerman*, 1995 WL 289682 at *3. Accordingly, we conclude that the district court erred in holding to the contrary.

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[10] The Hennessy plaintiffs take no part in this argument.

Nevertheless, we cannot agree that a remand is appropriate or that the district court erred in granting summary judgment for the FDIC. Section 402(b)(3) of ERISA requires that every employee benefit plan shall "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. Sec. 1102(b)(3) (1988). The summary plan booklet for the 65 Special states that:

> Meritor intends the plan to be permanent, but since future conditions affecting your employment cannot be anticipated or foreseen, Meritor reserves the right to *amend*, modify or terminate the plan at any time, which may result in the termination or modification of your coverage.

Campbell App. at 165a. Similarly, the summary plan booklet for the MGLIP states:

> Meritor reserves the right to terminate the group life insurance policy for its employees and retirees at any time, if Meritor determines that such termination is in its best interests. If Meritor terminates its group life insurance policy, employees and retirees who die after the effective date of the termination (other than those who are totally disabled and insured under the provision of "Continuation of Life Insurance During Disability") will not have any life insurance.

Campbell App. at 152a. While section 402(b)(3) of ERISA requires that every employee benefit plan have a procedure for amending or terminating the plan, the Supreme Court has determined that language such as that stated above reserving the right of "the Company" to modify or amend a plan satisfies the requirements of

section 402(b)(3). *Curtiss-Wright*, ___ U.S. at ___, 115 S.Ct. at 1228-29 ("*Curtiss-Wright* is correct, we think, that this states an amendment procedure and one that, like the identification procedure, is more substantial than might first appear."). The Court explained that "the literal terms of Sec. 402(b)(3) are ultimately indifferent to the level of detail in an amendment procedure, or in an identification procedure for that matter." *Id.* at ___, 115 S.Ct. at 1229. Further, the Court explained that "principles of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of the company." *Id.* Because the 65 Special and the MGLIP reserve to Meritor (the Company) the right to terminate these plans, we find no violation of the terms of section 402(b)(3).

The question therefore becomes what "procedure" the FDIC must follow when it is appointed receiver for Meritor and it terminates an employee welfare benefit plan pursuant to such a reservation clause. Certainly, under such circumstances, it would make little sense to require the FDIC to follow *Meritor's* procedure for terminating these plans (i.e., calling a meeting of the Board of Directors of *Meritor* or taking other corporate action). While the appropriate analog within the FDIC to Meritor's Board of Directors is not immediately apparent, it is clear that an official receiver has great discretion in taking action that would previously have been handled through the normal methods of corporate governance. Thus, the receiver alone may act in ways that might otherwise require Board action. The record reflects, and the plaintiffs concede, that on December 11, 1992, "the FDIC" sent the Campbell and Adolph plaintiffs mailings

notifying them of the termination of the 65 Special and the MGLIP. Joint Statement of Undisputed and Disputed Facts Regarding Motions for Summary Judgment, Campbell App. at 416a-17a; Joint Statement of Undisputed and Disputed Facts Regarding Motions for Summary Judgment, Adolph App. at 368a (incorporating statement of undisputed facts in Campbell case by reference). Since the plaintiffs acknowledged that they received notice of the plan terminations from "the FDIC," we decline to require further investigation into the methods by which the FDIC makes its decisions. Accordingly, we will uphold the district court's grant of summary judgment for the FDIC on plaintiffs' claims for health and life insurance benefits.

V. STATUTORY PENALTY UNDER 29 U.S.C. Sec. 1132(c)(1)

The Campbell plaintiffs next allege that the district court erred in determining that the FDIC was not liable for the penalty found at 29 U.S.C. Sec. 1132(c)(1) for failure to respond in a timely manner to a request for plan documents. According to these plaintiffs, their counsel sent an ERISA document request to the FDIC as administrator of the Meritor Pension Plan and the Meritor Savings Bank Savings Plan on March 16, 1993. The FDIC did not respond until September 21, 1993, 189 days after the initial request. Because ERISA provides that the plan administrator must mail requested material within 30 days of such a request, the Campbell plaintiffs assert that they are entitled to the requisite statutory penalty of

up to $100.00 a day for each day the plan administrator failed to comply.

We cannot agree. ERISA provides that an administrator who fails or refuses to mail requested documents within 30 days after such request:

> may *in the court's discretion* be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. Sec. 1132(c)(1)(B) (Supp. V 1993) (emphasis added). The district court in this case made two alternative findings. First, it determined that while by its terms ERISA's requirements and penalties apply to all administrators, "the requirement should not apply to the FDIC since it is an agency of the federal government." Campbell, 1994 WL 475067, at *7. Second, it determined that even if the statutory penalty for failure to provide requested information in a timely manner is applicable to the FDIC, "the court shall exercise its discretion under 29 U.S.C. Sec. 1132(c)(1) and award no penalty in this case." *Id.* The court explained that any penalty applied "would be an unjustifiable windfall to the plaintiffs and would hinder the FDIC in achieving its public mission – the orderly wrapping up of Meritor's affairs." *Id.*

As the district court noted, the issue of whether the penalty provision of Sec. 1132(c)(1) applies to the FDIC when it acts as receiver for a failed financial institution is one of first impression. *Id.* at *6. We agree that nothing on the face of Sec. 1132(c) exempts the FDIC from the requirement of furnishing requested documents in a

timely manner. We therefore see no reason to adopt a rule categorically excluding the FDIC from this important ERISA obligation. The reasoning of the district court, that the requirement should not apply to the FDIC since it is an agency of the federal government, is unconvincing. Employees' need for access to significant information about plan coverage does not diminish because the entity currently in charge of the plan is an agency of the federal government.[11]

Concerning the district court's alternative holding, however, we have previously determined that whether a district court awards a plaintiff monetary damages under 29 U.S.C. Sec. 1132(c)(1) is a matter of discretion. *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1369 (1994). Since the district court did determine that any penalty in this case would be an "unjustifiable windfall" and "would hinder" the FDIC in "the orderly wrapping up of Meritor's affairs," we cannot conclude that the district court abused its discretion in declining to award a statutory penalty. Accordingly, we will affirm the order of the district court denying the Campbell plaintiffs a Sec. 1132(c)(1) penalty award.

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[11] The FDIC suggests that 12 U.S.C. Sec. 1825(b)(3), a FIRREA provision, creates an exemption from the ERISA penalty requirement. That provision states that the FDIC, when acting as receiver, "shall not be liable for any amounts in the nature of penalties or fines." 12 U.S.C. Sec. 1825(b)(3). Read as a whole, however, Sec. 1825 appears to concern exemptions from *taxes*. We therefore find this argument unconvincing.

VI. CLASS ACTION ISSUES

The Campbell plaintiffs also raise a number of issues concerning the district court's decision to deny certification of three plaintiff classes. The district court determined that the plaintiffs failed to establish the threshold requirements under Rule 23(a) of the Federal Rules of Civil Procedure. *Campbell*, No. 93-3969, at 5, 7, 9 (E.D.Pa. June 30, 1994) (order denying class certification). In addition, the district court found that class certification under Rule 23(b)(1) or Rule 23(b)(2) would be inappropriate. *Id.* at 9. Because of our decision on the merits of the Campbell plaintiffs' claims, that these claims cannot survive summary judgment, we need not address the propriety of the district court's decision to deny class certification. We therefore take no position with respect to these issues.

VII. CONCLUSION

The district court did not err in granting summary judgment to the FDIC on the plaintiffs' claims for separation pay, health insurance benefits, and life insurance benefits. We will therefore affirm the orders of the district court. Further, because the district court did not abuse its discretion in declining to find the FDIC liable for the statutory penalty prescribed by 29 U.S.C. Sec. 1132(c)(1), we will affirm the order of the district court pertaining to this issue. Finally, because of our conclusion on the merits of the Campbell plaintiffs' claims, that the district court did not err in granting summary judgment for the FDIC, we do not reach the class certification issues.

Each party to bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1857

JOHN T. HENNESSY; MICHAEL B. HIGH; WILLIAM A. BRACKEN; LARRY GIBSON; MARTHA C. HITCHCOCK; LAURENCE A. LISS; KEN MANCINI; GEORGE S. RAPP; ROBERTA GRIFFIN TORIAN; FRANK J. SORIERO

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK
(D.C. Civil No. 93-cv-05589)

THOMAS CALLAHAN

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK
(D.C. Civil No. 94-cv-01949)

John T. Hennessy, Roberta Griffin Torian, Michael B. High, William Bracken, Laurence Liss, Marty Hitchcock, George S. Rapp, Kenneth R. Mancini, Lawrence J. Gibson, Frank J. Soriero and Thomas Callahan,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 93-cv-05589)

No. 94-1933

DAVID A. CAMPBELL, JR.; ROBERT F. HANNA; LESLIE VOTH; HELEN T. DEMARCO, individually,

and

ROBERT F. HANNA; HELEN T. DEMARCO, on behalf of themselves and all others similarly situated, (SEPARATION PLAN CLASS), and

DAVID A. CAMPBELL, JR.,

on behalf of himself and all others similarly situated, (RETIREE HEALTH CLASS), and

DAVID A. CAMPBELL, JR.; ROBERT F. HANNA, on behalf of themselves and all others similarly situated, (LIFE INSURANCE CLASS)

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MERITOR SAVINGS BANK

David A. Campbell, Jr., Robert F. Hanna, Helen T. DeMarco and Leslie Voth,

Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. 93-cv-03969)

No. 94-1934

JOSEPH A. ADOLF, LAURENCE J. ARNOLD, CHRISTIAN F. AURIG, GEORGE W. BARBER, LINDA C. BARCH, RICHARD F. BATE, OWEN J. BEHEN, LAUREN BETHEA, ELIZABETH L. BLANKENHORN, ANNE MARIE BOBACK, SUSAN M. BROWN, JOHN J. BUCZEK, GEORGE S. BUNTING, MARY ANN C. BURCH, EDITH BURKEITT, THOMAS P. CALLAHAN, DAVID A. CAMPBELL, JR., KARLA J. CARNEY, JOHN M. CASAMENTO, JR., WILLIAM J. CATHCART, LISA CAVALLI, NANCY L. CEFFARATTI, JOSEPH D.

CELLUCCI, ESTHER CERBO, CAROLE A. CIRCUCCI, ANTHONY R. COOGAN, LARRY A. COOK, SAMUEL J. COOK, WALLACE P. COONEY, PAUL L. COPPOLA, LORENE C. COQUILLETTE, BETTY R. CORLEY, HARRIET S. CORLEY, JOAN T. CORSON, DAVID E. COVERDALE, MARY C. CRAIGE, LOUIS T. CULLEN, JOHN F. CULP, EDWARD D. CUSTER, MICHAEL CZINCILA, JOAN E. DEBES, IRENE V. DELIZZIO, GAIL L. DELVISCIO, HAROLD L. DEMPSEY, HAROLD C. DENGEL, DEBRA ANNE DENIGHT, BEATRICE L. DESHER, JOSEPH H. DEVORE, JR., ANNA S. DIFELICE, MARIO DIFELICE, MARY ANN DIGREGORIO, LEONID A. DOBRININ, SARAH S. DOODY, JOSEPH M. DUFFY, LEONARD T. EBERT, JOHN A. FATULA, CHARLES J. FERRIE, GEORGE W. FETTERS, JR., LORE L. FISHER, JOHN P. FOGARTY, CYNTHIA M. FORD, DORIS GAGLIARDI, BARBARA A. GIBSON, FRANCES J. GILLEN, WILLIAM R. GOETTLE, CHARLES W. GRAY, III, EUGENE A. HEIWIG, WILLIAM H. HILLIARD, WILLIAM H.H. HSU, STANLEY E. HUNT, CHARLES C. JONES, THOMAS C. KEISER, KATHLEEN F. KELLY, LYNN M. KELLY, ETHEL S. KEOWEN, JOHN ANDREW KINNERMAN, PHILIP W. KLINGER, C. ANDREW KREPPS, JR., JOHN DAVID LAMBERT, MICHAEL G. LEWIS, PATRICIA LEUTHY, SALVATORE LIZZIO, ALDO S. LOMBARDI, ELISABETH W. LORD, KATHLEEN LYNCH, E. DAVID MACNALLY, WILLIAM C. MACNEILL, JR., FRANK JOSEPH MARULLO, EDWARD M. MASON, JR., THOMAS G. MARVEL, RUTH A. MCALLISTER, JOSEPH F. MCCOLE, CHRISTINE D. MCCORMICK, PHILIP J. MCCORMICK, JANET B. MCCOURT, DAVID C. MELNICOFF, FREDA I. MILLAR, ANTHONY M. MINGARINO, JOSEPH J. MOFFA, LINDA LEE MONTANA, BARBARA L. MORGAN, MARION D. MORGAN, LEONARD V. MORRIS, DAVID D. MORRISON, MARY T. MURPHY, ANTHONY J. NOCELLA, WILLIAM A. NORRIS, III, MARTHA K.

NYLUND, MARY E. ORR, JOHN T. OSMIAN, CHARLES E. PADGETT, PATRICIA PAWLING, HOWARD F. PEARCE, CATHERINE P. PICCONE, PETER P. PRYZBYLKOWSKI, DARLENE E. PURUGGANAN, ELIZABETH L. RAFETTO, EDWARD W. RAPP, LUBA K. REILLY, LOUISE M. REITANO, ANTOINETTE D. RENDINO, MS. JAMIE RINDOCK, JEAN DAVIS ROBINSON, RICHARD ROGERS, DIANE S. ROHR, HERBERT A. ROTH, ANTHONY J. SANTILLI, JR., KATHLEEN M. SAWCHYNSKY, RUTH C. SCHMIDT, MICHAEL F. SCUTTI, MARTIN SELGRATH, JOHN W. SEMPLE, JOSEPH F. SLANE, ROBERT A. SMALLEY, ELIZABETH K. SONNEBORN, FRED B. STAAS. WALTER R. STAPLES, ROBERT C. STEINMAN, ARTHUR W. STETTLER, JEAN J. STUBBS, ANTHONY TABASCO, ROBERT B. TAYLOR, ANNITA L. TEDESCO, KENNETH C. THOMAS, PATRICIA E. THOMPSON, DIANNE T. TINDALL, JAMES M. TOOLAN, MORRIS VARANO, STANLEY J. VERBEEK, DONNA VOLZ, LESLIE C. VOTH, THERESA M. WEBB, CYNTHIA WEST, ROBERT B. WHITELAW, ALTON T. WINNER, JR., ANNE M. WISE, VERDELLA WRIGHT, ANTHONY J. ZONGARO AND LINA G. ZANONI,

Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 94-cv-01499)

Present: Cowen, Lewis, and Garth, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on May 16, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered on July 29, 1994 in civil action Nos. 93-5589 and 94-1949, entered on August 30, 1994 in civil action No. 93-3969 and No. 94-1499, be, and the same are hereby affirmed as it has been concluded that the District Court did not err in granting summary judgment to the Federal Deposit Insurance Corporation ("FDIC") on the plaintiffs, claims for separation pay, health insurance benefits, and life insurance benefits.

Further, as the District Court did not abuse its discretion in declining to find the FDIC liable for the statutory penalty prescribed by 29 U.S.C. §1132(c) (1), the order of said District Court is affirmed pertaining to that issue.

The issues of class certification are not reached as it has been concluded on the merits of the Campbell plaintiffs' claims that the District Court did not err in granting summary judgment for the FDIC.

Each party to bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ P. Douglas Sigh
Clerk

Dated: June 29, 1995

Certified as a true copy and issued in lieu of a formal mandate on October 4, 1995.

Teste: /s/ P. Douglas Sigh
Clerk, U.S. Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN T. HENNESSEY, et al., — CIVIL ACTION

Plaintiffs, — No. 93-5589

v.

FEDERAL DEPOSIT
INSURANCE CORPORATION
as receiver for
MERITOR SAVINGS BANK,

Defendant

THOMAS CALLAHAN, — CIVIL ACTION

Plaintiff, — No. 94-1949

v.

FEDERAL DEPOSIT
INSURANCE CORPORATION
as receiver for
MERITOR SAVINGS BANK,

Defendant

JUDGMENT

AND NOW, this 29th day of July, 1994, it is hereby **ORDERED** that judgment is entered in favor of the defendant and against the plaintiffs.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN T. HENNESSEY, et al., — CIVIL ACTION

Plaintiffs, — No. 93-5589

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for MERITOR SAVINGS BANK,

Defendant

THOMAS CALLAHAN, — CIVIL ACTION

Plaintiff, — No. 94-1949

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for MERITOR SAVINGS BANK,

Defendant

ORDER AND MEMORANDUM

AND NOW, this 29th day of July, 1994, upon consideration of Plaintiffs' Motion for Summary Judgment, Defendant's Motion for Summary Judgment and the responses thereto, it is hereby **ORDERED** that the Plaintiffs' Motion is **DENIED** and Defendant's Motion is **GRANTED**.

This is an action by former managers of Meritor Saving Bank ("Bank") to recover severance pay from the Federal Deposit Insurance Corporation ("FDIC") following the FDIC's takeover of the Bank. The parties' cross-motions for summary judgment raise a number of issues:

1. Did the events surrounding the closing of the Bank constitute a "reorganization" which would trigger the Bank's severance pay plan (SPP)?

2. Did the plaintiffs' rights to severance pay vest prior to their termination? That is, did the plaintiffs' rights to severance pay become fixed and certain prior to the appointment of the FDIC as receiver?

3. Did the FDIC repudiate the severance plan?

4. Are the plaintiffs' claimed damages actual compensatory damages?

I. FACTS

The plaintiffs are all former managers of the Bank. During a period of major downsizing,[1] the Bank's parent unit, the Meritor Financial Group (the Bank and its parent are hereinafter collectively referred to as "Meritor"), created a severance pay program ("SPP") in order to retain employees. *See* Pls.' Ex. C., McCarron Dep. p. 48-49.

The plaintiffs each received personally addressed, but otherwise essentially identical letters, dated October 3, 1990, from Meritor's Chairman Roger S. Hillas. Statement of Undisputed Facts, ¶ 9; *see also* Second Amended Compl., Ex. B. The letters addressed Meritor's SPP. The operative parts of these letters state:

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[1] Between 1988 and 1992, Meritor divested many of its assets and business units. This resulted in a reduction in the number of Meritor employees from roughly 4,500 to roughly 1,000. Statement of Undisputed Facts, ¶ 2.

> Meritor senior management is acutely aware that it is essential to retain motivated employees such as you in key positions.
>
> As evidence of this awareness, Meritor is extending the severance benefit provided to you under the Separation Pay Program to a total of 52 weeks pay. This enhanced benefit will be payable under the same terms and conditions as provided for in the Separation Pay Program if you are separated from employment by Meritor anytime on or before December 31, 1992.[2]

Second Amended Compl, Ex. B.

The SPP was "designed to provide financial assistance during an employee's transition to new employment following an involuntary separation from the service of Meritor Financial Group where that separation results from lack of work, job elimination, reorganization, or reduction-in-force." Second Amended Compl, Ex. A, p. 1. The Summary Description of the SPP[3] stated that "Meritor reserves the right to modify the Separation Pay

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[2] Plaintiffs Callahan, Gibson and Soriero received letters extending their benefits for 26 weeks, rather than 52 weeks. Statement of Undisputed Facts, ¶ 11.

[3] The Summary Description states that "this booklet is a *summary* only, and that the details of the Separation Pay Program are explained in full detail in the Corporate Policy Manual." Second Amended Compl, Ex. A, p. 1 (emphasis in the original). The description goes on to state that if any inconsistency exists between the information described in the summary and the description in the Corporate Policy Manual, the Corporate Policy Manual will govern the outcome. *Id.* The Corporate Policy Manual is not part of the record before the court. Therefore, the Summary Plan Description controls any issue of the SPP's interpretation. *See* Statement of Undisputed Facts, ¶ 6, n.1.

Program at any time and from time to time, and to discontinue the Program in whole or in part at any time." *Id.* The SPP was an "employee welfare benefit plan" as defined by the Employment Retirement Income Security Act of 1974 (ERISA). Statement of Undisputed Facts, ¶ 6; *see also* 29 U.S.C. § 1002(1).

On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania determined that Meritor was in an unsafe and unsound condition. Statement of Undisputed Facts, ¶ 13. Accordingly, she closed the Bank and placed it in receivership. *Id.* Also on December 11, 1992, the FDIC was appointed as Meritor's receiver and it accepted this appointment. *Id.* The FDIC as receiver then executed a Purchase and Assumption agreement with Mellon Bank ("Mellon").[4] *Id.* ¶ 14; Pls.' Ex. F. This agreement transferred a portion of Meritor's assets and liabilities (but not liabilities for severance payments) to Mellon.[5] *Id.* The assets transferred totaled

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[4] In 1992, Meritor proposed to the FDIC that Meritor would sell the rest of its deposits and liquidate the remaining assets in a transaction following the pattern of the 1990 sale of its suburban bank branches to Mellon. Statement of Undisputed Facts, ¶¶ 2, 3. The FDIC in its corporate capacity never rejected the proposal. *Id.*

[5] The Purchase and Assumption agreement provided that Mellon would purchase: a) certain assets related to Meritor's banking business; b) Meritor's credit card business; c) Meritor's safe deposit, safekeeping and trust businesses, and d) its rights to provide mortgage services for others. Statement of Undisputed Facts, ¶ 14. Mellon assumed various liabilities, including liabilities on customer deposit accounts. Also, Mellon was given an option to purchase or lease Meritor branches and other bank premises owned or leased by Meritor. *Id.*

approximately $2.9 billion dollars. Pls.' Ex. E. The FDIC retained approximately $1.4 billion worth of assets not transferred to Mellon. *Id.*

Later on December 11, 1992, the FDIC closing manager, Jack Goodner, made a brief presentation to Meritor employees. When his comments were finished an employee asked whether severance would be paid. Statement of Undisputed Facts ¶ 15. Goodner thought not, but was not sure. *Id.* After looking towards two other FDIC officials for guidance, Goodner responded "No." *Id.;* Def. Ex. 4, Goodner Dep. p. 26-27.

The plaintiffs' employment terminated on December 11, 1992 upon the appointment of the FDIC as receiver.[6] Def.'s Am. Answer ¶ 16. The FDIC denied all the

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[6] On December 11th, following the FDIC's appointment as receiver, a meeting for Meritor employees was held. At the meeting no one ever explicitly informed the Meritor employees that they were terminated. Pls.' Ex. J, Goodner Dep., p. 42.

Effective at the close of business on December 11, 1992, plaintiffs became employees of Keytech Resources, Inc. Statement of Undisputed Facts, ¶ 20. Keytech was an employment service working for Mellon Bank. *Id.* While Mellon expressed an intention to hire a substantial number of employees, it had no obligation to do so. See Def. Ex. 17, Mancini Dep. Ex. 26. Mellon also indicated that the FDIC "terminated all Meritor employees" on December 11, 1992. *Id.* Plaintiffs who were terminated involuntarily from Keytech received some severance pay based on their years of service with Meritor. Statement of Undisputed Facts, ¶ 21; *see, e.g.*, Def. Ex. 1., Bracken Dep., p. 50 (two weeks severance). Mellon ultimately paid for these severance expenditures. Def. Ex. 10, Hitchcock Dep. p. 13. No Meritor assets were used to make these payments. Statement of Undisputed Facts, ¶ 22.

plaintiffs' claims for severance payments.[7] Statement of Undisputed Facts ¶ 15; Second Amended Compl., Ex. C. The FDIC has a long established but unwritten policy and practice of not paying severance claims filed by employees of failed banks. *Id.* ¶ 18.

On the Monday following the events of Friday, December 11, 1992, described above, the former branches of Meritor opened as usual under the name Mellon-PSFS without interruption to the business of regular customers. Statement of Undisputed Facts 5.

II. DISCUSSION

A. Was there a reorganization?

While the plaintiffs argue that their severance rights under the SPP were activated when they were terminated as part of a reorganization,[8] the facts and the law do not support this contention. The critical question is whether the new entity carried forward the business enterprise of Meritor. *Atlas Tool Co. v. Commissioner of Internal Revenue*, 614 F.2d 860, 868-867 [sic] (3d Cir.), *cert. denied*, 449 U.S.

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[7] The FDIC does not assert that the severance payments plaintiffs seek are "golden parachute payments." *Cf.* 12 U.S.C. § 1828(k) (4) (defining golden parachute payments). The FDIC may prohibit or limit any golden parachute payments regardless of whether such payment is fixed and certain at the time of the institutions insolvency. 12 U.S.C. § 1828(k) (1).

[8] Because the term "reorganization" is not defined in the SPP, the court will use its ordinary meaning. The word "reorganization" is defined as "the act or process of reorganizing." Webster's New Collegiate Dictionary 972 (1979). "Reorganize" is defined as "to organize again or anew." *Id.*

836 (1980). The FDIC sold part of Meritor to Mellon and is in the process of liquidating the rest. This does not constitute a continuation of business, but rather a termination of business. Because the FDIC was involved with the termination of Meritor rather then [sic] the continuation of its business, there was no reorganization. *Id.* The sale of assets from one entity to another without retention of any interest by the seller in the purchase is not a reorganization. *Cortland Specialty Co. v. Commissioner of Internal Revenue*, 60 F.2d 937, 939 (1932), *cert. denied*, 288 U.S. 599 (1933). This was not a corporate readjustment of existing interests. *United States v. Niagara Hudson Power Corp.*, 53 F. Supp. 796, 801 (S.D.N.Y. 1944).

B. Vesting

The rights of parties are determined as of the closing time of a financial institution and the appointment of a receiver. *In re Christian A. Fisher Building & Loan Assoc.*, 339 Pa. 5, 7 (1940). The receiver may only pay claims that were fixed and certain (i.e. provable) at the time of appointment. *See Kennedy v. Boston-Continental Nat'l Bank*, 84 F.2d 592, 597 (1st Cir. 1936), *cert. dismissed*, 300 U.S. 684 (1937). *Kennedy*, a leading case in the area and the principal authority cited by both sides, states that

> to establish a claim against an insolvent national bank in receivership the liability of the bank (here the lessee) must have accrued and become unconditionally fixed **on or before the time it was declared insolvent.**
>
> The amount of the claim may be later established, but, when established, it must be the

> **amount *due* and *owing* at the time of the declaration of insolvency. . . . If nothing is due at the time of insolvency, the claim should not be allowed.**

Kennedy, 84 F.2d at 597 (bold emphasis added, italics emphasis in the original) (citations omitted); *see* also *Dababneh v. FDIC*, 971 F.2d 428, 434 (10th Cir. 1992) (the claims "must have been in existence **before** insolvency") (quoting *FDIC v. Liberty Nat'l Bank*, 806 F.2d 961, 965 (10th Cir. 1986)).

The plaintiffs had no contractual rights to severance benefits at the time the FDIC was appointed receiver. The letters sent to the plaintiffs did not create any greater right to severance benefits than those possessed by other Meritor employees. The October 3, 1990 letters specifically limited plaintiffs benefits to "the same terms and conditions as provided for in the Separation Pay Program." *See* Second Amended Compl., Ex. B. The SPP explicitly stated that the plan may be withdrawn at any time. Second Amended Compl., Ex. A, p. 1. Therefore, the plaintiffs' rights to severance did not vest by virtue of the October 3, 1990 letter. The only way the plaintiffs' rights could have vested was by the occurrence of one of the enumerated conditions precedent in the SPP (i.e. "involuntary separation from the service of Meritor Financial Group where that separation results from lack of work, job elimination, reorganization, or reduction-in-force.") during the period in which the SPP was in effect.

Pursuant to its terms, the SPP could have been terminated at any time. An employer may generally terminate welfare benefit plans at will, so long as the procedure followed is consistent with the plan and ERISA. *Deibler v.*

Local Union 23, 973 F.2d 206, 210 (3d Cir. 1992). Because both the FDIC and Meritor had the right to terminate the SPP at will, the plaintiffs had no vested right to severance pay.

The plaintiffs have the burden of showing that they were involuntarily separated before the appointment of the receiver. *See Dabaḇneh*, 971 F.2d at 434. Since plaintiffs were not terminated prior to the appointment of the FDIC as receiver, their rights to severance pay did not vest until after Meritor was declared insolvent by the Commonwealth's Secretary of Banking.

Since the plaintiffs' rights to severance did not arise prior to the FDIC takeover, the court must now address whether their right to severance arose after the FDIC takeover.

C. Repudiation

1. FDIC's right to repudiate

Plaintiffs cannot recover severance pay in this case because the FDIC repudiated the SPP upon its appointment as receiver. As receiver, the FDIC had the power to repudiate any contract that it determines to be "burdensome" in order to "promote the orderly administration of the institution's affairs." 12 U.S.C. § 1821(e)(1); *Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993). The FDIC may exercise its right to repudiate within a reasonable time period following its appointment as receiver. 12 U.S.C. § 1821(e)(2); *see also 1185 Ave. of America Assoc. v. RTC*, 22 F.3d 494, 498 (2d Cir. 1994) (repudiation after 90 days not unreasonable under the circumstances). If the FDIC

chooses to repudiate a contract, it may repudiate a contract retroactively to its date of appointment as receiver. 12 U.S.C. § 1821(e)(3)(A)(ii). Because the SPP was unfunded, *see* Second Amended Compl., Ex. C., the FDIC could reasonably determine that, in wrapping up the affairs of Meritor, paying severance pay to plaintiffs would be "burdensome." *Morton v. Arlington Heights Federal Sav. & Loan*, 836 F. Supp. 477, 485 (N.D. Ill. 1993) ("**Any** unnecessary payment is burdensome to an insolvent institution" (emphasis in the original)). Pursuant to its authority under section 1821(e), the FDIC immediately repudiated the SPP on the day of its appointment as receiver. On the day Meritor was closed, the FDIC closing manager, Jack Goodner, informed Meritor employees that they would not receive severance pay. Def. Ex. 4, Goodner Dep. p. 26-27. While this repudiation may have been informal, it was clear, unambiguous and reasonable under the circumstances. *See Lawson v. FDIC*, 3 F.3d. 11, 15 (1st Cir. 1993).

The court's scope of review of the FDIC decision to repudiate is very limited. *Cf. Howell*, 986 F.2d at 572. ("litigant would normally have an uphill battle in overturning an FDIC finding of 'burden' "); *Atlantic Mechanical, Inc. v. RTC*, 772 F. Supp. 288 (E.D. Va. 1991) (abuse of discretion standard applied), *aff'd*, 953 F.2d 637 (4th Cir. 1992); *Morton v. Arlington Heights Federal Sav. & Loan*, 836 F. Supp. 477, 484-85 (N.D. Ill. 1993) (questioning whether a district court has jurisdiction to review a receiver's repudiation of a contract). The receiver has wide discretion to decide what is burdensome. 12 U.S.C. § 1821(e)(1)(B); *1185 Ave. of America Assoc. v. RTC*, 22 F.3d 494, 498 (2d Cir. 1994). The receiver does not have to give

reasons for that decision. *1185 Ave. of America Assoc.*, 22 F.3d at 498; *Morton*, 836 F. Supp. at 485. Because the receiver did not desire to continue the employment of any of the plaintiffs, it was reasonable for the FDIC to repudiate the SPP and the individual letters. *See Morton*, 836 F. Supp. at 485-86.

2. Actual direct damages

The plaintiffs ability to recover for damages caused by the FDIC's repudiation of the SPP are limited to actual direct compensatory damages. 12 U.S.C. § 1821(e)(3). Severance payments are not such damages. *Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993). Therefore, plaintiffs' claims for damages do not survive.

In *Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993), four officers of a failed bank brought suit against the FDIC for severance pay. The bank by letter agreement[9] promised the officers severance pay in the event of termination. 986 F.2d at 570. The letters made clear that these agreements did not alter the "at will" employment relationship between the parties. *Id.* The officers alleged that the FDIC knew of and approved of their agreements with the bank. *Id.* at 571. After the bank failed, the FDIC was appointed receiver. *Id.* Within two months, the officers were terminated. The officers filed claims for severance pay with the

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[9] These letters did not create an ERISA employee welfare benefit plan. *See Deibler v. Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992). The letters were specifically addressed to a small group of bank officers and were simple contracts and not an employee welfare benefit plan.

FDIC. The FDIC disallowed these claims as violative of public policy. *Id.* The district court ruled that the FDIC lawfully repudiated the contracts between the plaintiffs and the bank and that under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") 103 Stat. 183 (codified in various sections of 12 and 18 U.S.C.), there were no compensable damages for the resulting breach. *Id.*

Because the *Howell* court found that the FDIC validly repudiated the plaintiff officers' contracts, its decision focused on whether the officers could recover damages for the repudiation of those contracts. *See* 12 U.S.C. 1821(e)(3). A receiver's liability for repudiation of any contract is limited to actual direct compensatory damages suffered by an aggrieved person as a result of the repudiation. 12 U.S.C. § 1821(e)(3)(A)(i). The *Howell* court held that the officers' claims did not comprise allowable claims under FIRREA, because severance payments are not "actual direct compensatory damages" under 12 U.S.C. § 1821(e)(3)(A)(i). *Id.* at 572-73. The court concluded that severance payments

> are at best an estimate of likely harm made at a time when only prediction is possible. When discharge actually occurs, the employee may have no way to prove the loss from alternative employments foregone, not to mention possible disputes about the discharged employee's ability to mitigate damages by finding new employment. A severance agreement properly protects against these uncertainties by liquidating the liability. Such payments comprise or are analogous to "liquidated damages," at least when the

amount is not so large as to constitute an unenforceable penalty.

Howell, 986 F.2d at 573.

The factual situation in *Office and Professional Employees Int'l Union v. F.D.I.C.*, No. 93-5093, 1994 WL 288200 (D.C. Cir. July 1, 1994) (hereinafter *OPEIU*) makes the case distinguishable from the case at bar. In *OPEIU*, the plaintiff union and its members had entered into a collective bargaining agreement with the National Bank of Washington. As part of this agreement the bank agreed to make severance payments in the event employees were terminated for economic reasons. Four days after the FDIC was appointed receiver, the FDIC met with union representatives and formally repudiated the collective bargaining agreement. The union filed claims with the FDIC for severance pay on behalf of its members. The FDIC denied these claims. The district court found for the FDIC.

On appeal, the union challenged the district court's decision that the FDIC was not liable for damages as a result of the repudiation. *See* 12 U.S.C. 1821(e)(3) (limiting a receiver's lability [sic] to actual direct compensatory damages for repudiation of any contract). The *OPEIU* court reversed the district court's decision holding that the "employees had a right to severance pay as of the date of the appointment – albeit a contingent one – and that right should be treated essentially the same as the right to accrued vacation pay or health benefits." 1994 WL 288200 at *2. The court held that the employees right to severance pay was vested since it was part of the

employees' compensation package (i.e. part of the collective bargaining agreement) and therefore it had a real present value. *Id.*

The *OPEIU* decision is distinguishable from the case at bar because the DC circuit based its decision on the union's collective bargaining agreement. To illustrate the "real value" of the severance plan, the court stated that if the bank had repudiated the collective bargaining agreement the union could have gone to court under the Taft-Hartley Act for enforcement of the agreement including the value of the repudiated severance pay provisions. In the case at bar, however, the plaintiffs could not have enforced the SPP in court because Meritor had the right to terminate the SPP at will. Therefore, in the case at bar, the SPP had no real value at the date of insolvency and the court cannot base actual compensatory damages upon the severance pay program's provisions.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1857

JOHN T. HENNESSY; MICHAEL B. HIGH; WILLIAM A. BRACKEN; LARRY GIBSON; MARTHA C. HITCHCOCK; LAURENCE A. LISS; KEN MANCINI; GEORGE S. RAPP; ROBERTA GRIFFIN TORIAN; FRANK J. SORIERO

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK
(D.C. Civil No. 93-cv-05589)

THOMAS CALLAHAN

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK
(D.C. Civil No. 94-cv-01949)

John T. Hennessy, Roberta Griffin Torian, Michael B. High, William Bracken, Laurence Liss, Marty Hitchcock, George S. Rapp, Kenneth R. Mancini, Lawrence J. Gibson, Frank J. Soriero and Thomas Callahan,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 93-cv-05589)

No. 94-1933

DAVID A. CAMPBELL, JR.; ROBERT F. HANNA; LESLIE VOTH; HELEN T. DEMARCO, individually, and

ROBERT F. HANNA; HELEN T. DEMARCO, on behalf of themselves and all others similarly situated, (SEPARATION PLAN CLASS), and

DAVID A. CAMPBELL, JR.,

on behalr of himself and all others similarly situated, (RETIREE HEALTH CLASS), and

DAVID A. CAMPBELL, JR.; ROBERT F. HANNA, on behalf of themselves and all others similarly situated, (LIFE INSURANCE CLASS)

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MERITOR SAVINGS BANK

David A. Campbell, Jr., Robert F. Hanna, Helen T. DeMarco and Leslie Voth,

Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. 93-cv-03969)

No. 94-1934

JOSEPH A. ADOLF, LAURENCE J. ARNOLD, CHRISTIAN F. AURIG, GEORGE W. BARBER, LINDA C. BARCH, RICHARD F. BATE, OWEN J. BEHEN, LAUREN BETHEA, ELIZABETH L. BLANKENHORN, ANNE MARIE BOBACK, SUSAN M. BROWN, JOHN J. BUCZEK, GEORGE S. BUNTING, MARY ANN C. BURCH, EDITH BURKEITT, THOMAS P. CALLAHAN,

DAVID A. CAMPBELL, JR., KARLA J. CARNEY, JOHN M. CASAMENTO, JR., WILLIAM J. CATHCART, LISA CAVALLI, NANCY L. CEFFARATTI, JOSEPH D. CELLUCCI, ESTHER CERBO, CAROLE A. CIRCUCCI, ANTHONY R. COOGAN, LARRY A. COOK, SAMUEL J. COOK, WALLACE P. COONEY, PAUL L. COPPOLA, LORENE C. COQUILLETTE, BETTY R. CORLEY, HARRIET S. CORLEY, JOAN T. CORSON, DAVID E. COVERDALE, MARY C. CRAIGE, LOUIS T. CULLEN, JOHN F. CULP, EDWARD D. CUSTER, MICHAEL CZINCILA, JOAN E. DEBES, IRENE V. DELIZZIO, GAIL L. DELVISCIO, HAROLD L. DEMPSEY, HAROLD C. DENGEL, DEBRA ANNE DENIGHT, BEATRICE L. DESHER, JOSEPH H. DEVORE, JR., ANNA S. DIFELICE, MARIO DIFELICE, MARY ANN DIGREGORIO, LEONID A. DOBRININ, SARAH S. DOODY, JOSEPH M. DUFFY, LEONARD T. EBERT, JOHN A. FATULA, CHARLES J. FERRIE, GEORGE W. FETTERS, JR., LORE L. FISHER, JOHN P. FOGARTY, CYNTHIA M. FORD, DORIS GAGLIARDI, BARBARA A. GIBSON, FRANCES J. GILLEN, WILLIAM R. GOETTLE, CHARLES W. GRAY, III, EUGENE A. HEIWIG, WILLIAM H. HILLIARD, WILLIAM H.H. HSU, STANLEY E. HUNT, CHARLES C. JONES, THOMAS C. KEISER, KATHLEEN F. KELLY, LYNN M. KELLY, ETHEL S. KEOWEN, JOHN ANDREW KINNERMAN, PHILIP W. KLINGER, C. ANDREW KREPPS, JR., JOHN DAVID LAMBERT, MICHAEL G. LEWIS, PATRICIA LEUTHY, SALVATORE LIZZIO, ALDO S. LOMBARDI, ELISABETH W. LORD, KATHLEEN LYNCH, E. DAVID MACNALLY, WILLIAM C. MACNEILL, JR., FRANK JOSEPH MARULLO, EDWARD M. MASON, JR., THOMAS G. MARVEL, RUTH A. MCALLISTER, JOSEPH F. MCCOLE, CHRISTINE D. MCCORMICK, PHILIP J. MCCORMICK, JANET B. MCCOURT, DAVID C. MELNICOFF, FREDA I. MILLAR, ANTHONY M.

MINGARINO, JOSEPH J. MOFFA, LINDA LEE MONTANA., BARBARA L. MORGAN, MARION D. MORGAN, LEONARD V. MORRIS, DAVID D. MORRISON, MARY T. MURPHY, ANTHONY J. NOCELLA, WILLIAM A. NORRIS, III, MARTHA K. NYLUND, MARY E. ORR, JOHN T. OSMIAN, CHARLES E. PADGETT, PATRICIA PAWLING, HOWARD F. PEARCE, CATHERINE P. PICCONE, PETER P. PRYZBYLKOWSKI, DARLENE E. PURUGGANAN, ELIZABETH L. RAFETTO, EDWARD W. RAPP, LUBA K. REILLY, LOUISE M. REITANO, ANTOINETTE D. RENDINO, MS. JAMIE RINDOCK, JEAN DAVIS ROBINSON, RICHARD ROGERS, DIANE S. ROHR, HERBERT A. ROTH, ANTHONY J. SANTILLI, JR., KATHLEEN M. SAWCHYNSKY, RUTH C. SCHMIDT, MICHAEL F. SCUTTI, MARTIN SELGRATH, JOHN W. SEMPLE, JOSEPH F. SLANE, ROBERT A. SMALLEY, ELIZABETH K. SONNEBORN, FRED B. STAAS, WALTER R. STAPLES, ROBERT C. STEINMAN, ARTHUR W. STETTLER, JEAN J. STUBBS, ANTHONY TABASCO, ROBERT B. TAYLOR, ANNITA L. TEDESCO, KENNETH C. THOMAS, PATRICIA E. THOMPSON, DIANNE T. TINDALL, JAMES M. TOOLAN, MORRIS VARANO, STANLEY J. VERBEEK, DONNA VOLZ, LESLIE C. VOTH, THERESA M. WEBB, CYNTHIA WEST, ROBERT B. WHITELAW, ALTON T. WINNER, JR., ANNE M. WISE, VERDELLA WRIGHT, ANTHONY J. ZONGARO AND LINA G. ZANONI,

Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE, SAROKIN and GARTH*, Circuit Judges

The petitions for rehearing filed by appellants in Nos. 941857; 94-1933 and 94-1934 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: SEP 26 1995

*As to panel rehearing.

FINANCIAL INSTITUTION REFORM, RECOVERY AND ENFORCEMENT ACT OF 1989 (FIRREA)

§ 1821. Permanent Insurance Fund

* * *

(c) Appointment of Corporation as conservator or receiver (1) In general. Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation may accept appointment and act as conservator or receiver for any insured depository institution upon appointment in the manner provided in paragraph (2) or (3).

(2) Federal depository institutions. (A) Appointment (i) Conservator. The Corporation may, at the discretion of the supervisory authority, be appointed conservator of any insured Federal depository institution or District bank and the Corporation may accept such appointment.

(ii) Receiver. The Corporation shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution or District bank by the appropriate Federal banking agency, notwithstanding any other provision of Federal law (other than section 21A of the Federal Home Loan Bank Act [12 USCS § 1441a]) or the code of law for the District of Columbia.

(B) Additional powers. In addition to and not in derogation of the powers conferred and the

duties imposed by this section on the Corporation as conservator or receiver, the Corporation, to the extent not inconsistent with such powers and duties, shall have any other power conferred on or any duty (which is related to the exercise of such power) imposed on a conservator or receiver for any Federal depository institution under any other provision of law.

(C) Corporation not subject to any other agency. When acting as conservator or receiver pursuant to an appointment described in subparagraph (A), the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges.

(D) Depository institution in conservatorship subject to banking agency supervision. Notwithstanding subparagraph (C), any Federal depository institution for which the Corporation has been appointed conservator shall remain subject to the supervision of the appropriate Federal banking agency.

(3) Insured State depository institutions. (A) Appointment by appropriate State supervisor. Whenever the authority having supervision of any insured State depository institution (other than a District depository institution) appoints a conservator or receiver for such institution and tenders appointment to the Corporation, the Corporation may accept such appointment.

(B) Additional powers. In addition to the powers conferred and the duties related to the exercise of such powers imposed by State law on any conservator or receiver appointed under

the law of such State for an insured State depository institution, the Corporation, as conservator or receiver pursuant to an appointment described in subparagraph (A), shall have the powers conferred and the duties imposed by this section on the Corporation as conservator or receiver.

(C) Corporation not subject to any other agency. When acting as conservator or receiver pursuant to an appointment described in subparagraph (A), the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the agency or department of the United states or any State in the exercise of its rights, powers, and privileges.

(D) Depository institution in conservatorship subject to banking agency supervision. Notwithstanding subparagraph (C), any insured State depository institution for which the Corporation has been appointed conservator shall remain subject to the supervision of the appropriate State bank or savings association supervisor.

(4) Appointment of Corporation by the Corporation. Except as otherwise provided in section 21A of Federal Home Loan Bank Act [12 USCS § 1441a] and notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation may appoint itself as sole conservator or receiver of any insured State depository institution if –

(A) the Corporation determines –

(i) that –

(I) a conservator, receiver, or other legal custodian has been appointed for such institution;

(II) such institution has been subject to the appointment of any such conservator, receiver, or custodian for a period of at least 15 consecutive days; and

(III) 1 or more of the depositors in such institution is unable to withdraw any amount of any insured deposit; or

(ii) that such institution has been closed by or under the laws of any State; and

(B) the Corporation determines that 1 or more of the grounds specified in paragraph (5) –

(i) existed with respect to such institution at the time –

(I) the conservator, receiver, or other legal custodian was appointed; or

(II) such institution was closed; or

(ii) exist at any time –

(I) during the appointment of the conservator, receiver, or other legal custodian; or

(II) while such institution is closed.

(5) Grounds for appointing conservator or receiver. The grounds for appointing a conservator or receiver

(which may be the Corporation) for any insured depository institution are as follows:

(A) Assets insufficient for obligations. The institution's assets are less than the institution's obligations to its creditors and others, including members of the institution.

(B) Substantial dissipation. Substantial dissipation of assets or earnings due to –

(i) any violation of any statute or regulation; or

(ii) any unsafe or unsound practice.

(C) Unsafe or unsound condition. An unsafe or unsound condition to transact business.

(D) Cease and desist orders. Any willful violation of a cease-and-desist order which has become final.

(E) Concealment. Any concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the appropriate Federal banking agency or State bank or savings association supervisor.

(F) Inability to meet obligations. The institution is likely to be unable to pay its obligations or meet its depositors' demands in the normal course of business.

(G) Losses. The institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the institution to become adequately capitalized (as defined in

section 38(b)) [12 USCS § 1831o(b)] without Federal assistance.

(H) Violations of law. Any violation of any law or regulation, or any unsafe or unsound practice or condition that is likely to –

(i) cause insolvency or substantial dissipation of assets or earnings;

(ii) weaken the institution's condition; or

(iii) otherwise seriously prejudice the interests of the institution's depositors or the deposit insurance fund.

(I) Consent. The institution, by resolution of its board of directors or its shareholders or members, consents to the appointment.

(J) Cessation of insured status. The institution ceases to be an insured institution.

(K) Undercapitalization. The institution is undercapitalized (as defined in section 38(b) [12 USCS § 1831o(b)]), and –

(i) has no reasonable prospect of becoming adequately capitalized (as defined in that section);

(ii) fails to become adequately capitalized when required to do so under section 38(f)(2)(A) [12 USCS § 1831o(f)(2)(A)];

(iii) fails to submit a capital restoration plan acceptable to that agency within the time prescribed under section 38(e)(2)(D) [12 USCS § 1831o(e)(2)(D)]; or

(iv) materially fails to implement a capital restoration plan submitted and accepted

under section 38(e)(2) [12 USCS § 1831o(e)(2)].

(L) The institution –

(i) is critically undercapitalized, as defined in section 3(b) [12 USCS § 1831o(b)]; or

(ii) otherwise has substantially insufficient capital.

(M) Money laundering offense. The Attorney General notifies the appropriate Federal banking agency or the Corporation in writing that the insured depository institution has been found guilty of a criminal offense under section 1956 or 1957 of Title 18, United States Code, or section 5322 of title 31, United States Code.

(6) Appointment by Director of the Office of Thrift Supervision. (A) Conservator. The Corporation or the Resolution Trust Corporation may, at the discretion of the Director of the Office of Thrift Supervision, be appointed conservator and the Corporation may accept any such appointment.

(B) Receiver. Whenever the Director of the Office of Thrift Supervision appoints a receiver under the provisions of subparagraph (A) or (C) of section 5(d)(2) of the Home Owners' Loan Act [12 USCS § 1464(d)(2)(A) or (C) for the purpose of liquidation or winding up any savings association's affairs –

(i) before such date as is determined by the Chairperson of the Thrift Depositor Protection Oversight Board under section 21A(b)(3)(A)(ii) of the Federal Home Loan Bank Act [12 USCS § 1441a(b)(3)(A)(ii)], the

Resolution Trust Corporation shall be appointed;

(ii) on or after the date determined by the Chairperson of the Thrift Depositor Protection Oversight Board under section 21A(b)(3)(A)(ii) of the Federal Home Loan Bank Act [12 USCS § 1441a(b)(3)(A)(ii)], the Resolution Trust Corporation shall be appointed if the Resolution Trust Corporation had been placed in control of the depository institution at any time before such date; and

(iii) on or after the date determined by the Chairperson of the Thrift Depositor Protection Oversight Board under section 21A(b)(3)(A)(ii) of the Federal Home Loan Bank Act [12 USCS § 1441a(b)(3)(A)(ii)], 1993, the Corporation shall be appointed unless the Resolution Trust Corporation is required to be appointed under clause (ii).

(7) Judicial review. If the Corporation appoints itself as conservator or receiver under paragraph (4), the insured State depository institution may, within 30 days thereafter, bring an action in the United States district court for the judicial district in which the home office of such institution is located, or in the United States District Court for the District of Columbia, for an order requiring the Corporation to remove itself as such conservator or receiver, and the court shall, upon the merits, dismiss such action or direct the Corporation to remove itself as such conservator or receiver.

(8) Replacement of conservator of State depository institution. (A) In general. In the case of any insured State depository institution for which the Corporation appointed itself as conservator

pursuant to paragraph (4), the Corporation may, without any requirement of notice, hearing, or other action, replace itself as conservator with itself as receiver of such institution.

(B) Replacement treated as removal of incumbent. The replacement of a conservator with a receiver under subparagraph (A) shall be treated as the removal of the Corporation as conservator.

(C) Right of review of original appointment not affected. The replacement of a conservator with a receiver under subparagraph (A) shall not affect any right of the insured State depository institution to obtain review, pursuant to paragraph (7), of the original appointment of the conservator.

(9) Appropriate Federal banking agency may appoint Corporation as conservator or receiver for insured State depository institution to carry out section 38 [12 USCS § 1831]. (A) In general. The appropriate Federal banking agency may appoint the Corporation as sole receiver (or, subject to paragraph (11), sole conservator) of any insured State depository institution, after consultation with the appropriate State supervisor, if the appropriate Federal banking agency determines that –

(i) 1 or more of the grounds specified in subparagraphs (K) and (L) of paragraph (5) exist with respect to that institution; and

(ii) the appointment is necessary to carry out the purpose of section 38 [12 USCS § 1831o].

(B) Nondelegation. The appropriate Federal banking agency shall not delegate any action under subparagraph (A).

(10) Corporation may appoint itself as conservator or receiver for insured depository institution to prevent loss to deposit insurance fund. The Board of Directors may appoint the Corporation as sole conservator or receiver of an insured depository institution, after consultation with the appropriate Federal banking agency and the appropriate State supervisor (if any), if the Board of Directors determines that –

(A) 1 or more of the grounds specified in any subparagraph of paragraph (5) exist with respect to the institution; and

(B) the appointment is necessary to reduce –

(i) the risk that the deposit insurance fund would incur a loss with respect to the insured depository institution, or

(ii) any loss that the deposit insurance fund is expected to incur with respect to that institution.

(11) Appropriate Federal banking agency shall not appoint conservator under certain provisions without giving Corporation opportunity to appoint receiver. The appropriate Federal banking agency shall not appoint a conservator for an insured depository institution under subparagraph (K) or (L) of paragraph (5) without the Corporation's consent unless the agency has given the Corporation 48 hours notice of the agency's intention to appoint the conservator and the grounds for the appointment.

(12) Directors not liable for acquiescing in appointment of conservator or receiver. The members of the

board of directors of an insured depository institution shall not be liable to the institution's shareholders or creditors for acquiescing in or consenting in good faith to –

(A) the appointment of the Corporation or the Resolution Trust Corporation as conservator or receiver for that institution; or

(B) an acquisition or combination under section 38(f)(2)(A)(iii) [12 USCS § 1831o(f)(2)(A)(iii)].

(13) Additional powers. In any case in which the Corporation is appointed conservator or receiver under paragraph (4), (6), (9), or (10) for any insured State depository institution –

(A) this section shall apply to the Corporation as conservator or receiver in the same manner and to the same extent as if that institution were a Federal depository institution for which the Corporation had been appointed conservator or receiver; and

(B) the Corporation as receiver of the institution may –

(i) liquidate the institution in an orderly manner; and

(ii) make any other disposition of any matter concerning the institution, as the Corporation determines is in the best interests of the institution, the depositors of the institution, and the Corporation.

(C) [Redesignated]

(d) **Powers and duties of Corporation as conservator or receiver.** (1) Rulemaking authority of Corporation. The Corporation may prescribe such regulations as

the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers. (A) Successor to institution. The Corporation shall, as conservator or receiver, and by operation of law, succeed to –

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution. The Corporation may (subject to the provisions of section 40 [12 USCS § 1831q] of this title), as conservator or receiver –

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which is consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and shareholders. The Corporation may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator. The Corporation may, as conservator, take such action as may be –

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

(E) Additional powers as receiver. The Corporation may (subject to the provisions of section 40 [12 USCS § 1831q]), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

(F) Organization of new institutions. The Corporation may, as receiver –

(i) with respect to savings associations and by application to the Director of the Office of Thrift Supervision, organize a new Federal savings association to take over such assets or such liabilities as the Corporation may determine to be appropriate; and

(ii) with respect to any insured bank, organize a new national bank under subsection (m) or a bridge bank under subsection (n).

(G) Merger; transfer of assets and liabilities. (i) In general. The Corporation may, as conservator or receiver –

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency. No transfer described in clause (i)(II) may be made to another depository institution (other than a new bank or a bridge bank established pursuant to subsection (m) or (n)) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations. The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this Act.

(I) Subpoena authority. (i) In general. The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim

against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 8(h) [12 USCS § 1818(n)], and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

(ii) Authority of board of directors. A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Board of Directors or their designees (or, in the case of a subpoena or subpoena duces tecum issued by the Resolution Trust Corporation under this subparagraph and section 21A(b)(4), only by, or with the written approval of, the Board of Directors of such Corporation or their designees).

(iii) Rule of construction. This subsection shall not be construed as limiting any rights that the Corporation, in any capacity, might otherwise have under section 10(c) of this Act [12 USCS § 1820(c)].

(J) Incidental powers. The Corporation may, as conservator or receiver –

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this Act and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this Act, which the Corporation determines is in the

best interests of the depository institution, its depositors, or the Corporation.

(K) Utilization of private sector. In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, only if such services are available in the private sector and the Corporation determines utilization of such services is the most practicable, efficient, and cost effective.

(3) Authority of receiver to determine claims. (A) In general. The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B) Notice requirements. The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall –

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required. The receiver shall mail a notice similar to the notice published under

subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books –

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

(4) Rulemaking authority relating to determination of claims. (A) In general. The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(B) Final settlement payment procedure. (i) In general. In the handling of receiverships of insured depository institutions, to maintain essential liquidity and to prevent financial disruption, the Corporation may, after the declaration of an institution's insolvency, settle all uninsured and unsecured claims on the receivership with a final settlement payment which shall constitute full payment and disposition of the Corporation's obligations to such claimants.

(ii) Final settlement payment. For purposes of clause (i), a final settlement payment shall be payment of an amount equal to the product of the final settlement payment rate and the amount of the uninsured and unsecured claim on the receivership; and

(iii) Final settlement payment rate. For purposes of clause (ii), the final settlement

payment rate shall be a percentage rate reflecting an average of the Corporation's receivership recovery experience, determined by the Corporation in such a way that over such time period as the Corporation may deem appropriate, the Corporation in total will receive no more or less than it would have received in total as a general creditor standing in the place of insured depositors in each specific receivership.

(iv) Corporation authority. The Corporation may undertake such supervisory actions and promulgate such regulations as may be necessary to assure that the requirements of this section can be implemented with respect to each insured depository institution in the event of its insolvency.

(5) Procedures for determination of claims. (A) Determination period. (i) In general. Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time. The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient. The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to

the last address of the claimant which appears –

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance. If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain –

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims. The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period. (i) In general. Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final. (ii) Certain exceptions. Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in

the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if –

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims. (i) In general. The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors. In the case of a claim of a creditor against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution –

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and

(II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions. No provision of this paragraph shall apply with respect to –

(I) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(II) any security interest in the assets of the institution securing any such extension of credit.

(E) No judicial review of determination pursuant to subparagraph (d) No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F) Legal effect of filing. (i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) Provision for agency review or judicial determination of claims. (A) In general. Before the end of the 60-day period beginning on the earlier of –

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations. If any claimant fails to –

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) Review of claims. (A) Administrative hearing. If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of

Title 5, United States Code [5 USCS §§ 701 et seq.].

(B) Other review procedures. (i) In general. The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria. In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures. The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

(iv) Consideration of incentives. The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims. (A) Establishment required. The Corporation shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who –

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period. Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall –

(i) determine –

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit. Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of –

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) Statute of limitations. If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) Legal effect of filing. (i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9) Agreement as basis of claim. (A) Requirements. Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 13(e) [12 USCS § 1823(e)], shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement. Notwithstanding section 13(e)(2) [12 USCS § 1823(e)(2)], any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and

any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

(10) Payment of claims. (A) In general. The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this Act.

(B) Payment of dividends on claims. The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(11) Depositor preference. (A) In general. Subject to section 5(e)(2)(C) [12 USCS § 1815(e)(2)(C)], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B) Effect on State law. (i) In general. The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

(ii) Procedure for determination of inconsistency. Upon the Corporation's own motion or upon the request of any person with a claim described in subparagraph (A) or any State which is submitted to the Corporation in accordance with procedures which the Corporation shall prescribe, the Corporation shall determine whether any provision of the law of any State is inconsistent with any provision of subparagraph (A) and the extent of any such inconsistency.

(iii) Judicial review. The final determination of the Corporation under clause (ii) shall be subject to judicial review under chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.].

(C) Accounting report. Any distribution by the Corporation in connection with any claim described in subparagraph (A)(v) shall be accompanied by the accounting report required under paragraph (15)(B).

(12) Suspension of legal actions. (A) In general. After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed –

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver,

in any judicial action or proceeding to which such institution is or becomes a party. (B) Grant of stay by all courts required. Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13) Additional rights and duties. (A) Prior final adjudication. The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver. In the event of any appealable judgment, the Corporation as conservator or receiver shall –

(i) have all the rights and remedies available to the insured depository institution

(before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution. No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review. Except as otherwise provided in this subsection, no court shall have jurisdiction over –

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets. In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 13(d)(1) [12 USCS § 1823(d)(1)], the Corporation shall conduct its operations in a manner which –

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

(14) Statute of limitations for actions brought by conservator or receiver. (A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be –

(i) in the case of any contract claim, the longer of –

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 21A(b)(14) of the Federal Home Loan Bank Act) [12 USCS § 1441a(b)(14)], the longer of –

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues. For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of –

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(15) Accounting and recordkeeping requirements. (A) In general. The Corporation as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.

(B) Annual accounting or report. With respect to each conservatorship or receivership to which the Corporation was appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver.

(C) Availability of reports. Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public.

(D) Recordkeeping requirement. After the end of the 6-year period beginning on the date

the Corporation is appointed as receiver of an insured depository institution, the Corporation may destroy any records of such institution which the Corporation, in the Corporation's discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.

(16) Contracts with state housing finance authorities. (A) In general. The Corporation may enter into contracts with any State housing finance authority for the sale of mortgage-related assets (as such terms are defined in section 1301 of the Financial Institution Reform, Recovery, and Enforcement Act of 1989 [12 USCS § 1441a-1]), of any depository institution in default (including assets and liabilities associated with any trust business), such contracts to be effective in accordance with their terms without any further approval, assignment, or consent with respect thereto.

(B) Factors to consider. In evaluating the disposition of mortgage related assets to any State housing finance authority the Corporation shall consider –

(i) the State housing finance authority's ability to acquire and service current, delinquent, and defaulted mortgage related assets;

(ii) the State housing finance authority's ability to further national housing policies;

(iii) the State housing finance authority's sensitivity to the impact of the sale of mortgage related assets upon the State and local communities;

(iv) the costs to the Federal Government associated with alternative ownership or dispositions of the mortgage related assets;

(v) the minimization of future guaranties which may be required of the Federal Government;

(vi) the maximization of mortgage related asset values; and

(vii) the utilization of institutions currently established in mortgage related asset market activities.

(17) Fraudulent transfers. (A) In general. The Corporation, as conservator or receiver for any insured depository institution, and any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision may avoid a transfer of any interest of an institution-affiliated party, or any person who the Corporation or conservator determines is a debtor of the institution, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Corporation or conservator was appointed conservator or receiver if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution, the Corporation or other conservator, or any other appropriate Federal banking agency.

(B) Right of recovery. To the extent a transfer is avoided under subparagraph (A), the Corporation or any conservator described in such subparagraph may recover, for the benefit of the insured depository institution, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from –

(i) the initial transferee of such transfer or the institution-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(C) Rights of transferee or obligee. The Corporation or any conservator described in subparagraph (A) may not recover under subparagraph (B) from –

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

(D) Rights under this paragraph. The rights under this paragraph of the Corporation and any conservator described in subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under Title 11, United States Code.

(18) Attachment of assets and other injunctive relief. Subject of paragraph (19), any court of competent jurisdiction may, at the request of –

(A) the Corporation (in the Corporation's capacity as conservator or receiver for any insured depository institution or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under section 11, 12, or 13 [12 USCS § 1821, 1822, or 1823]); or

(B) any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, issue an order in

accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation or such conservator under the control of the court and appointing a trustee to hold such assets.

(19) Standards. (A) Showing. Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(B) State proceeding. If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to such party's right to due process as Rule 65 (as modified with respect to such proceeding by subparagraph (A)), the relief sought by the Corporation or a conservator pursuant to paragraph (18) may be requested under the laws of such State.

(e) Provisions relating to contracts entered into before appointment of conservator or receiver. (1) Authority to repudiate contracts. In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease –

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation. The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation. (A) In general. Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be

(i) limited to actual direct compensatory damages; and

(ii) determined as of

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages. For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include –

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts. In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) except as otherwise specifically provided in this section.

(4) Leases under which the institution is the lessee. (A) In general. If the conservator or receiver disaffirms or repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.

(B) Payments of rent. Notwithstanding subparagraph (A), the lessor under a lease to which such subparagraph applies shall –

(i) be entitled to the contractual rent accruing before the later of the date –

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective,

unless the lessor is in default or breach of the terms of the lease;

(ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall be paid in accordance with this subsection and subsection (i).

(5) Leases under which the institution is the lessor. (A) In general. If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either –

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) Provisions applicable to lessee remaining in possession. If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph –

(i) the lessee –

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository institution under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II).

(6) Contracts for the sale of real property. (A) In general. If the conservator or receiver repudiates any contract (which meets the requirements of each paragraph of section 13(e) [12 USCS § 1823(e)]) for the sale of real property and the purchaser of such real property under such contract is in possession and is not, as of the date of such repudiation, in default, such purchaser may either –

(i) treat the contract as terminated by such repudiation; or

(ii) remain in possession of such real property.

(B) Provisions applicable to purchaser remaining in possession. If any purchaser of real property under any contract described in

subparagraph (A) remains in possession of such property pursuant to clause (ii) of such subparagraph –

(i) the purchaser –

(I) shall continue to make all payments due under the contract after the date of the repudiation of the contract; and

(II) may offset against any such payments any damages which accrue after such date due to the nonperformance (after such date) of any obligation of the depository institution under the contract; and

(ii) the conservator or receiver shall –

(I) not be liable to the purchaser for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II);

(II) deliver title to the purchaser in accordance with the provisions of the contract; and

(III) have no obligation under the contract other than the performance required under subclause (II).

(C) Assignment and sale allowed. (i) In general. No provision of this paragraph shall be construed as limiting the right of the conservator or receiver to assign the contract described in subparagraph (A) and sell the property subject to the contract and the provisions of this paragraph.

(ii) No liability after assignment and sale. If an assignment and sale described in clause (i) is consummated, the conservator or receiver shall have no further liability under the contract described in subparagraph (A) or with respect to the real property which was the subject of such contract.

(7) Provisions applicable to service contracts. (A) Services performed before appointment. In the case of any contract for services between any person and any insured depository institution for which the Corporation has been appointed conservator or receiver, any claim of such person for services performed before the appointment of the conservator or the receiver shall be –

(i) a claim to be paid in accordance with subsections (d) and (i); and

(ii) deemed to have arisen as of the date the conservator or receiver was appointed.

(B) Services performed after appointment and prior to repudiation. If, in the case of any contract for services described in subparagraph (A), the conservator or receiver accepts performance by the other person before the conservator or receiver makes any determination to exercise the right of repudiation of such contract under this section –

(i) the other party shall be paid under the terms of the contract for the services performed; and

(ii) the amount of such payment shall be treated as an administrative expense of the conservatorship or receivership.

(C) Acceptance of performance no bar to subsequent repudiation The acceptance by any conservator or receiver of services referred to in subparagraph (B) in connection with a contract described in such subparagraph shall not affect the right of the conservator or receiver to repudiate such contract under this section at any time after such performance.

(8) Certain qualified financial contracts. (A) Rights of parties to contracts Subject to paragraph (10) of this subsection and notwithstanding any other provision of this Act (other than subsection (d)(9) of this section and section 13(e) [12 USCS § 1823(e)]), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising –

(i) any right to cause the termination or liquidation of any qualified financial contract with an insured depository institution which arises upon the appointment of the Corporation as receiver for such institution at any time after such appointment;

(ii) any right under any security arrangement relating to any contract or agreement described in clause (i); or

(iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more contracts and agreements described in clause (i), including any master agreement for such contracts or agreements.

(B) Applicability of other provisions. Subsection (d)(12) shall apply in the case of any judicial action or proceeding brought against any

receiver referred to in subparagraph (A), or the insured depository institution for which such receiver was appointed, by any party to a contract or agreement described in subparagraph (A)(i) with such institution.

(C) Certain transfers not avoidable. (i) In general. Notwithstanding paragraph (11), the Corporation, whether acting as such or as conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution.

(ii) Exception for certain transfers Clause (i) shall not apply to any transfer of money or other property in connection with any qualified financial contract with an insured depository institution if the Corporation determines that the transferee had actual intent to hinder, delay, or defraud such institution, the creditors of such institution, or any conservator or receiver appointed for such institution.

(D) Certain contracts and agreements defined. For purposes of this subsection –

(i) Qualified financial contract. The term "qualified financial contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation to be a qualified financial contract for purposes of this paragraph.

(ii) Securities contract. The term "securities contract" –

(I) has the meaning given to such term in section 741(7) of Title 11, United States Code, except that the term "security" (as used in such section) shall be deemed to include any mortgage loan, any mortgage-related security (as defined in section 3(a)(41) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(41)]), and any interest in any mortgage loan or mortgage-related security; and

(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

(iii) Commodity contract. The term "commodity contract" has the meaning given to such term in section 761(4) of Title 11, United States Code.

(iv) Forward contract. The term "forward contract" has the meaning given to such term in section 101(24) of Title 11, United States Code.

(v) Repurchase agreement. The term "repurchase agreement" –

(I) has the meaning given to such term in section 101(41) of Title 11, the United States Code except that the items (as described in such section) which may be subject to any such agreement shall be deemed to include

mortgage-related securities (as such term is defined in section 3(a)(41) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(41)]), any mortgage loan, and any interest in any mortgage loan; and

(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

(vi) Swap agreement. The term "swap agreement" –

(I) means any agreement, including the terms and conditions incorporated by reference in any such agreement, which is a rate swap agreement, basis swap, commodity swap, forward rate agreement, interest rate future, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency future, or currency option purchased or any other similar agreement, and

(II) includes any combination of such agreements and any option to enter into any such agreement.

(vii) Treatment of master agreement as 1 swap agreement. Any master agreement for any agreements described in clause (vi)(I) together with all supplements to

such master agreement shall be treated as 1 swap agreement.

(viii) Transfer. The term "transfer" has the meaning given to such term in section 101(50) of Title 11, United States Code.

(E) Certain protections in event of appointment of conservator. Notwithstanding any other provision of this Act (other than paragraph (12) of this subsection, subsection (d)(9) of this section, and section 13(e) of this Act [12 USCS § 1323(e)]), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising –

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a depository institution in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

(ii) any right under any security arrangement relating to such qualified financial contracts; or

(iii) any right to offset or net out any termination values, payment amounts, or other transfer obligations arising under or in connection with such qualified financial contracts.

(9) Transfer of qualified financial contracts. In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either –

(A) transfer to 1 depository institution (other than a depository institution in default) –

(i) all qualified financial contracts between –

(I) any person or any affiliate of such person; and

(II) the depository institution in default;

(ii) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

(iii) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

(iv) all property securing any claim described in clause (ii) or (iii) under any such contract; or

(B) transfer none of the financial contracts, claims, or property referred to in subparagraph (A) (with respect to such person and any affiliate of such person).

(10) Notification of transfer. (A) In general. If –

(i) the conservator or receiver for an insured depository institution in default makes any transfer of the assets and liabilities of such institution; and

(ii) the transfer includes any qualified financial contract,

the conservator or receiver shall use such conservator's or receiver's best efforts to notify any person who is a party to any such contract of such transfer by 12:00, noon (local time) on the business day following such transfer.

(B) Business day defined. For purposes of this paragraph, the term "business day" means any day other than and Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) Certain security interests not avoidable. No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

(12) Authority to enforce contracts. (A) In general. The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of a conservator or receiver.

(B) Certain rights not affected. No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a director's or officer's liability insurance contract or

depository institution bond under other applicable law.

(13) Exception for federal reserve and federal home loan banks No provision of this subsection shall apply with respect to –

(A) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(B) any security interest in the assets of the institution securing any such extension of credit.

* * *

Supreme Court, U.S.
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Nos. 95-1000 and 95-1002

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN T. HENNESSY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK, ET AL.

ROBERT F. HANNA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

JACLYN C. TANER
MARIA BEATRICE VALDEZ
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

15 pp

QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC), acted within its discretion under 12 U.S.C. 1821(e)(1) in repudiating a failed depository institution's severance plan.

2. Whether severance benefits allegedly payable to former employees of an insured depository institution upon their involuntary termination are recoverable against the FDIC, as receiver, as "actual direct compensatory damages" within the meaning of 12 U.S.C. 1821(e)(3).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 58 F.3d 908. The opinion of the district court in No. 95-1000 (*Hennessy, et al.* v. *FDIC* (Pet. App. 49a-60a)) is reported at 858 F. Supp. 483. The opinions of the district court in No. 95-1002 (*Campbell, et al.* v. *FDIC* (Pet. App. 35a-47a) and *Adolf, et al.* v. *FDIC* (Pet. App. 33a-35a)) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1995. A petition for rehearing was denied on

[1] "Pet. App." refers to the appendix to the petition in No. 95-1002.

September 26, 1995. Pet. App. 70a-73a. The petitions for writs of certiorari in No. 1002 (Hanna Pet.) and No. 1000 (Hennessy Pet.) were both filed on December 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania declared Meritor Savings Bank (Meritor) insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) receiver. Pet. App. 5a. In its capacity as receiver, the FDIC executed a Purchase and Assumption Agreement transferring a portion of Meritor's assets and liabilities to Mellon Bank (Mellon). *Ibid.* Under the terms of the Purchase and Assumption Agreement, the FDIC retained the liabilities not assumed by Mellon and the assets not purchased by Mellon, which it proceeded to liquidate for the benefit of Meritor's approved creditors. *Ibid.*

2. Prior to its insolvency, Meritor had maintained an unfunded employee welfare benefit plan, known as the Separation Pay Plan (SPP). The SPP provided severance benefits (based on years of work, up to a maximum of 26 weeks' salary) to employees who were involuntarily terminated due to "lack of work, job elimination, reorganization or reduction-in-force." Pet. App. 5a. "Lack of work" was a defined term that applied only when, as the "result of a decrease in volume of work to be done, a position [wa]s temporarily not needed." *Id.* at 15a. "Job elimination" occurred under the SPP only when, "as a result of a reorganization, changing business needs, or the sale, closure or relocation of an office, a specific position [wa]s determined to be unnecessary to the company

for an indefinite period of time." *Id.* at 14a. Meritor retained discretionary authority to modify or discontinue the SPP in whole or in part at any time. *Id.* at 6a.

3. On the day the Pennsylvania Secretary of Banking declared Meritor insolvent, the FDIC's closing manager informed the employees that the FDIC would not make severance payments. Pet. App. 7a. At the close of business that day, Meritor's former employees became employees of Keytech Resources, Inc., a company established to provide staffing for the Meritor offices that had been purchased by Mellon. *Ibid.* Mellon paid severance benefits to those employees who were subsequently laid off. Their payments were based on their years of service with Meritor, up to a maximum of four weeks salary per employee. *Ibid.*

4. In July, 1993, four of the current Hanna petitioners (one retiree and three individuals who had been Meritor employees on December 11, 1992) filed suit against the FDIC, as receiver, in the United States District Court for the Eastern District of Pennsylvania on behalf of themselves and a class of similarly situated employees (the *Campbell* suit). The other Hanna petitioners (a group of former Meritor employees and retirees) filed suit against the FDIC solely in their individual capacities (the *Adolf* suit). Ten former Meritor managers (the Hennessy petitioners) also sued the FDIC in their individual capacities (the *Hennessy* suit).[2] Pet. App. 8a-11a. All

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[2] One former Meritor manager, Thomas Callahan, filed his own suit challenging the receiver's denial of severance benefits. Callahan's complaint was identical to that filed by the Hennessy plaintiffs, his case was tried alongside theirs, and the *Hennessy*

three suits sought, *inter alia*, severance benefits under the SPP.[3] *Ibid.*

The Hennessy petitioners argued before the district court that their severance rights under the SPP were triggered because they were terminated as part of a "reorganization." Pet. App 8a. The Hanna petitioners claimed (in *Campbell* and *Adolf*) that they were entitled to severance payments because they were involuntarily terminated due to "job elimination" or "lack of work." *Id.* at 14a. Petitioners all alleged, in addition, that the FDIC did not properly repudiate the SPP under 12 U.S.C. 1821(e)(1), Pet. App. 18a, and that, even if the FDIC did properly repudiate the SPP, they were entitled to severance benefits as "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3), Pet. App. 21a.

On July 29, 1994, the district court ruled for the FDIC in *Hennessy* on the parties' cross-motions for summary judgment. Pet. App. 49a-60a. The court rejected the Hennessy petitioners' assertion that their termination resulted from a reorganization of Meritor. It explained that "the FDIC was involved with the termination of Meritor rather than the continuation of its business." *Id.* at 54a. Because the right to severance had not been triggered, and Meritor (and, later, the FDIC) retained the right to terminate the SPP at will, the court concluded that,

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decisions by the district court and court of appeals disposed of Callahan's claims. Pet. App. 1a, 49a, 70a. Callahan's petition is consolidated with those of the Hennessy plaintiffs.

[3] Among other things, the Hanna petitioners also sought benefits under Meritor's retiree health and life insurance plans. Those claims were rejected by the district court (Pet. App. 43a-44a) and the court of appeals (*id.* at 25a-28a), and they have not been renewed before this Court.

at the time Meritor was closed, the Hennessy petitioners had no vested rights to severance benefits. *Id.* at 55a-56a. The court further concluded that, upon its appointment as receiver, the FDIC had lawfully repudiated the SPP, under 12 U.S.C. 1821(e)(1), and that the Hennessy petitioners' claims for severance benefits were not claims for "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3). Pet. App. 56a- 60a.

Relying on its decision in *Hennessy*, the district court rejected the Hanna petitioners' claims for severance benefits, granting summary judgment for the FDIC in *Adolf* (Pet. App. 33a-34a) and in *Campbell* (*id.* at 35a-47a).

5. The court of appeals affirmed. It agreed with the district court that the closure of Meritor and the appointment of the FDIC as receiver did not trigger a right to benefits under the SPP because those events did not constitute a reorganization. Pet. App. 12a-15a. The court noted that both Congress and the courts have recognized that, unlike a conservator (which preserves the institution as a going concern), a receiver is empowered to liquidate the institution and wind up its affairs. *Id.* at 13a (citing *RTC* v. *Cedar-Minn Bldg. Ltd. Partnership*, 956 F.2d 1446, 1454 (8th Cir.), cert. denied, 113 S. Ct. 94 (1992); *FDIC* v. *Grella* 553 F.2d 258, 261 (2d Cir. 1977); H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 396 (1989)). Here, the court found, the FDIC's sale of some of Meritor's assets to Mellon, Mellon's assumption of some of Meritor's liabilities, and the FDIC's liquidation of the remaining Meritor assets for the benefit of Meritor's creditors were consistent with the winding up of a failed bank's affairs. Pet. App. 13a. In the court's view, to suggest that those transactions constituted a

"reorganization" of Meritor was to "turn a blind eye to the dispositive facts." *Ibid.*

The court also rejected the contentions by the Hanna petitioners that their rights to severance were triggered because they were involuntarily terminated either as the result of "job elimination" or as the result of "lack of work." The court observed that "no specific position" had been determined to be "unnecessary" for an "indefinite period of time," and no employee had been laid off because he or she was "temporarily not needed" as a "result of a decrease in volume of work." Pet. App. 14a-15a. Rather, Meritor's employees lost their jobs because "the Secretary of Banking closed the entire bank." *Ibid.*

The court went on to hold that, even if it were to assume that a triggering event had occurred: (i) petitioners had no vested right to severance pay prior to, or at the time of, the appointment of the FDIC as receiver (Pet. App. 15a-18a); (ii) the FDIC had properly repudiated the SPP (*id.* at 18a-21a); and (iii) petitioners were not entitled to severance benefits as "actual direct compensatory damages" arising from that repudiation (*id.* at 21a-42a).

ARGUMENT

Petitioners contend that this Court should grant certiorari to decide whether the court of appeals erred in holding that their claims for benefits were not claims for "actual direct compensatory damages," within the meaning of 12 U.S.C. 1821(e)(3), arising from the FDIC's repudiation of the SPP. Hanna Pet. 9-22; Hennessy Pet. 15-20. The Hennessy petitioners argue (Pet. 9-15), in addition, that the court of appeals erred in holding that the FDIC lawfully repudiated the SPP pursuant to the FDIC's longstanding view

that the payment of severance benefits is burdensome on the receivership and that the repudiation of a severance plan by the receiver promotes the orderly administration of the institution's affairs. Neither issue is properly presented for resolution in this case.[4] The court of appeals concluded that petitioners were not involuntarily terminated as the result of a reorganization or any other event that would have triggered their rights to benefits under the SPP. Petitioners therefore had no contractual right to severance pay,[5] and they would not be entitled to

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[4] The court of appeals' decision on the second issue is in accordance with the decisions of the other courts of appeals that have spoken to it. See Pet. App. 18a-21a. That issue would not warrant further review even if it were properly raised. The first issue, on the other hand, is one of considerable practical importance that has divided the courts of appeals. Compare *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir. 1993) (no liability, because loss of severance benefits does not give rise to actual direct compensatory damages), with *Office and Professional Employees Int'l Union* v. *FDIC*, 27 F.3d 598 (D.C. Cir. 1994) (*OPEU*) (rejecting *Howell*, and concluding that FDIC is liable for severance payments), and *Monrad* v. *FDIC*, 62 F.3d 1169 (9th Cir. 1995) (agreeing with *OPEU*). In an appropriate case, it may merit this Court's review.

[5] The Hanna petitioners have not asked this Court to review the court of appeals' affirmance of the district court's conclusion that their rights to severance under the SPP were not triggered by their termination. Although the Hennessy petitioners' do not, in so many words, propose that this Court review the court of appeals' interpretation of the severance plan, they argue that the court of appeals erred in failing to "put itself in Meritor's shoes and ask what the word [reorganization] meant as used in the SPP." Hennessy Pet. 23; see generally *id.* at 20-26. We believe that the district court and the court of appeals correctly interpreted the SPP. In all events, the court of appeals' holding respecting the meaning of

damages from the FDIC even if this Court were to conclude that the FDIC improperly repudiated the SPP under 12 U.S.C. 1821(e)(1) or that the right to severance payments gives rise to "actual direct compensatory damages" within the meaning of 12 U.S.C. 1821(e)(3).[6]

1. Contrary to petitioners' characterizations (Hanna Pet. 9; Hennessy Pet. 21), the court of appeals held unequivocally that petitioners' involuntary termination did not trigger their rights to severance payments. The court stated plainly that it was "unpersuaded by [petitioners'] argument" and that it "agree[d] with the determination of the district court" that neither the facts nor the law "support[ed] the conclusion that the Hennessy plaintiffs were terminated as part of a reorganization." Pet. App. 12a-13a. The court elaborated as follows:

> The Secretary of Banking for the Commonwealth of Pennsylvania closed Meritor Savings Bank. The FDIC was appointed receiver and it sold some of Meritor's assets to Mellon. As part of this transaction, Mellon agreed to assume some of Meritor's liabilities. The FDIC proceeded to liquidate the remaining assets of Meritor for the benefit of Meritor's creditors. These actions are commensurate with the winding up of a failed

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the SPP is a matter of no general importance and warrants no further review.

[6] The Hennessy petitioners conceded below (C.A. Reply Br. 5) that the issue whether their claims were provable in the receivership "presents itself only if the Court [were to conclude] that the events of December 11 * * * triggered the plaintiffs' SPP rights." See also *id.* at 7-8 (reiterating the point).

> bank's affairs and the proper function of a receiver. To suggest that these actions constituted a reorganization of Meritor would turn a blind eye to the dispositive facts. *We therefore cannot conclude that the district court erred in its determination that Meritor did not undergo a reorganization that would trigger plaintiffs' rights to severance pay.*

Id. at 13a (emphasis added).

The court of appeals also clearly rejected the Hanna petitioners' claim that they were entitled to severance pay because of "job elimination" or "lack of work." After reviewing the definitions of those terms within the SPP, the court held that it "[could] not conclude" that " 'job elimination' triggered a right to severance pay," or that "a 'lack of work' as defined by the plan, triggered the right to severance benefits." Pet. App. 15a. The court of appeals' opinion flatly contradicts petitioners' assertion (Hanna Pet. 9) that the court harbored doubt about whether petitioners established a contractual right to severance pay.[7]

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[7] The court of appeals did note that, because it held that the FDIC had properly repudiated the SPP, it did not need to address the Hennessy petitioners' alternative contention (made for the first time at oral argument) that they had contractual rights to severance benefits on the bases of "job elimination" or "lack of work." Pet. App. 15a n.7. The absence of a decision below specifically addressing the Hennessy petitioners' belated contention does not mean that those petitioners have an unresolved contract issue that would have to be resolved on its merits if this Court were to reverse the court of appeals on the repudiation issue. Under well established law, the Hennessy petitioners waived their claims for severance benefits on the grounds of "job elimination" or "lack of work" by failing to raise those claims in the district court or in their appellate briefs, particularly in light of the fact that their belated claims

2. Petitioners cite the court of appeals' reference to its normal practice of committing the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced (Pet. App. 18a) to support their assertion that "the court affirmed the district court's grant of summary judgment, solely on the ground that the FDIC had properly repudiated the Separation Plan and owed no damages under it." Hanna Pet. 11; see also Hennessy Pet. 21. The relevant passage of the court's opinion, however, emphasizes that the repudiation-related issues now raised by petitioners before this Court were addressed by the court of appeals only as alternative bases for affirming the district court.

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rely on factual assertions not developed in the record below. See *Hutchins* v. *IRS*, 67 F.3d 40, 45 (3d Cir. 1995) (refusing to consider issue raised for the first time in reply brief, and noting that waiver ruling was particularly appropriate because issue would require further factual development); *McLendon* v. *Continental Can Co.*, 908 F.2d 1171, 1183 (3d Cir. 1990).

Even if the Hennessy petitioners had not waived their claims for severance benefits on grounds of "job elimination" and "lack of work," those claims are foreclosed by the court of appeals' holding that those triggering events did not occur. The Hennessy petitioners' untimely assertion that they did not receive the November, 1989, plan documents defining "job elimination" and "lack of work," even if true, is of no consequence, because the Hennessy petitioners conceded in the district court that the November, 1989, revisions to the earlier plan document (which they did receive) did nothing "other than clarify the separation pay policy that had been in place prior to that time." Hennessy Pltf.'s Mem. Supporting Mot. for Summary Judgment 7-8 (quoting author of November 1989 document).

The court stated:

> *Having determined that there was no event that triggered the payment of severance benefits*, it would ordinarily be unnecessary to dispose of the other issues raised by the parties regarding their entitlement to severance pay, *i.e.*, repudiation and whether the failure to pay severance benefits constituted actual direct compensatory damages under FIRREA. However, the parties have forcefully argued their positions regarding the various 'triggering' provisions, and have at least implied that they are susceptible to more than one reasonable interpretation.

Pet. App. 18a (emphasis added). The court then went on to address alternative bases for affirming the district court. In doing so, however, the court indicated that it was not abandoning its antecedent holding that no triggering event had occurred. See *Ibid.* (noting that the court of appeals would rule for FDIC "even if [the court] were to assume a triggering event had occurred").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

JACLYN C. TANER
MARIA BEATRICE VALDEZ
Counsel
Federal Deposit Insurance Corporation

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